93-726

No._____

In The

Supreme Court of the United States

October Term, 1993

OMAR ZAKI GHOBASHY,

Petitioner,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

OMAR ZAKI GHOBASHY
Counsel of Record
Petitioner, Pro Se
85 Wildwood Road
New Rochelle, New York 10804
(914) 834-8462

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-3120

QUESTION PRESENTED

Is it not an error for the New York State Court of Appeals to decide that the order of the Appellate Division, First Department disbarring the applicant and removing his name from list of attorneys admitted to practice law in the State of New York, is not a final order from which an Appeal may heard by the Court of Appeals?

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In The

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OMAR ZAKI GHOBASHY,

Petitioner

v.

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner, Omar Z. Ghobashy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the State of New York Court of Appeals which dismissed the Appeal on ground that order of Disbarment does not finally determine the proceeding within the meaning of the Constitution, and motion for leave to appeal is denied, and that said motion for a stay be and the same is dismissed as academic.

OPINIONS BELOW

The Court of Appeals of the State of New York did not determine the Appeal on the merits, it denied review on ground that the order of the Appellate Division of the Supreme Court, New York County, is not a final order and therefore, it is not appealable.

JURISDICTION

This is an application for a writ of certiorari from Order of the Court of Appeals of the State of New York which dismissed the leave to Appeal from Order of Appellate Division of the Supreme Court, New York County, on ground that the order appealed from is not a final order (July 9, 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII and Amendment XIV(1) to the United States Constitution is set forth in Appendix H.

STATEMENT OF THE CASE

Chief Justice of the Appellate Division, First Judicial Department and the Chief of Panel in Disciplinary Proceeding in the Disbarment of this lawyer should have been disqualified.

Justice Murphy, the Chief Justice of the Appellate Division, First Department should have disqualified himself of deciding a case on Appeal from recommendations of the Disciplinary Committee that he selected. The Chief Judge will not disaffirm a Committee that he selected. There were prior disputes between the Disciplinary Committee and Chief Justice which resulted in the dismissal of the Chief of Disciplinary Committee.

The Chief of Disciplinary Committee is a resident of Westchester County, and should not have been selected as he is not a resident of New York County. As a Juror, he is not a resident of the county in which he determines the action. Many residents of New York County of minorities are excluded and not selected as Judges and non-judges by Justice Murphy. Only one sector of the population constitutes almost the entire Committee. It is believed that non of the members of the Disciplinary Committee is of Black, Latin American, Middle Eastern nor American Indians, attorneys and

non-attorneys who are residents of New York County. The method of selection of members of the Disciplinary Committee is not disclosed.

Thus, the composition of the Appellate Division Court that decides the Appeal, as composed of the Chief Justice, who appoints the Disciplinary Committee, must result in the disqualification of the Chief Justice from ruling on an Appeal from decision by the Disciplinary Committee.

The Court of Appeals of the State of New York erroneously decided that the this order is not final. Nothing remains to be done in this order. No explanation was given by the Court as to why the order of the Appellate Division is not a final order from which an Appeal is to be taken. No further order is required or expected, and the case was denied twice; once on Permission to Appeal submitted to Appellate Division by my lawyer Fredrick Lewis, Esq, and the second by Leave to Appeal to the State of New York Court of Appeals by my lawyer Nicholas Cooper, Esq. (See Appendix C.)

REASONS FOR GRANTING THE WRIT

Recognized principles of due process of law mandate that applicant be afforded a full and fair hearing. This Court has held that although the states have a compelling interest in regulation of the practice of law *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 792 [1975]; that power may not be exercised in an arbitrary or discriminatory manner *Konigsberg v. Bd. of Examiners*, 353 U.S. 252, 273 [1957], nor may it be exercised so as to abrogate federally protected rights *Bates v. St. Bar of Arizona*, 433 U.S. 350 [1977]; *Johnson v. Avery*, 939 U.S. 544, 551 [1969]; *see also*: *Erdmann v. Stevens*, 458 F. 2d 1205, 1210 [1972]; *Matter of Ming*, 459 F.2d 1352 [1935]. One of these "Federally protected rights" is an attorney's right to procedural due process in a disciplinary proceeding *Matter of Ruffalo*, 390 U.S. 544, 550 [1967]. In *Ruffalo*, the United States Supreme Court recognized that procedural due

process "includes fair notice of the charge ... and opportunity afforded [to] him for explanation and defense" *supra*, citing in part *Randall v. Brigham*, 7 Wall. 523, 540.

The State of New York Court of Appeals has long recognized that members of the bar cannot be deprived of the right to practice law without due process *Matter of Eldridge*, 82 N.Y. 161 [1880]; *see also*: *Matter of Kimball*, 33 NY2d 586. In *Matter of Mitchell*, 40 NY2d 153, the State of New York Court of Appeals stated that "the starting point for a discussion of appellant's due process claim must be the well-accepted rule that 'the requirements of procedural due process must be met before the State can exclude a person from practicing law'" (*supra* at 156); *see also*: *Matter of Levy*, 37 NY2d 279, in which it was recognized that an attorney must be assured of "full due process and fairness in recognition of the substantial interest that this is his in his right to practice law" (*supra* at 272).

In its 1984 decision in *Matter of Dondi*, 63 NY2d 331, 482 NYS2d 431, the State of New York Court of Appeals reaffirmed its long-standing recognition of the due process rights of attorneys in disciplinary proceedings (*supra* at 435). In *Dondi*, the Court dismissed disciplinary proceedings finding that the improper unsealing of criminal court records constituted a violation of the attorney's right to due process and was sufficient to justify a dismissal of the complaint due to the facts and circumstances of that case.

In *Dondi* the attorneys are entitled to fundamental fairness as a matter of due process of law in the prosecution of disciplinary proceedings against them. A review of the record herein demonstrates that the Respondent has been denied that fundamental fairness and thus has been deprived of due process by reason of the actions of the Hearing Panel, namely its clear violation of substantial procedural rules governing the conduct of hearings, namely 22 NYCRR 605.22(c).

If it is accepted, as the Appellate Division has found, that the Appellant waived his right to object to the violation of the quorum rule, by reason of the failure of his then attorney to raise a timely objection, then it is obvious that the Respondent has been deprived of due process of law by reason of the ineffective assistance of his then counsel. To permit Appellant's disbarment to stand when the result may clearly have been otherwise solely by reason of the failure of his attorney to raise a timely objection, is grossly, unfair and a clear deprivation of his procedural due process rights.

The decision of the Disciplinary Committee to disbar Appellant is excessive, discriminatory, unprecedented and contrary to Disciplinary Rules in New York, see article attached as Appendix B. The Decision was based on actions by the lawyer to inform the United States Immigration Service, in which cases were pending, of issues that must be disclosed in the petitions and supplements. The Attorney for Disciplinary Committee recommended cases that set up punishment not exceeding six months suspension of the attorney. In breach to the United States Constitution, Amendment VIII, disbarment is excessive, cruel and unusual punishment. The lawyer has the right to face his accusers and the deliberate acts of the Prosecutor to prevent the appearance of complainants to cross examine them in the hearing is a reversible error. Complainants or persons whose cases were heard by the Disciplinary Committee were purposefully prevented by the Prosecutor from appearing at the hearing to shield them from crimes committed under U.S. Immigration Laws. Notice of persons to appear in their cases was served on the eve of the trial, affording no time for Appellant to subpoena them.

a) **The case of Kahwaji:** A Syrian who applied for Political Asylum, and who was requested to file his Order to Show Cause by the U.S. Immigration to lawyer, when we applied Legalization for him. A procedure which was explained to Trial Court, but was not understood due to unfamiliarity of Panel of Immigration procedures.

Immigration Judge, Francis Lyons, appeared for Appellant, but was rushed out of Court and not questioned on these issues. Judge Lyons was interrupted and not afforded time to complete his answers as the information provided contradicted the Panel and did not support them .

Kahwaji and his wife did not appear as they are divorced and had never resided together. Affidavits submitted in the effect that Kahwaji never resided with his wife were concealed by Prosecutor. Prosecutor brought an Immigration Officer to testify on this case, which violates U.S. Immigration Law, that prohibits the appearance of U.S. Immigration officials in a State Court. Further violation was made when the Immigration officer appeared without the Immigration file of complainant, only to testify from memory. This Immigration officer, Mr. Blackman appeared without the permission and without the knowledge of the District Director. My then attorney, Mr. Beirvliet, was unable to handle the appearance of Blackman in an adequate way. The appearance of Blackman was to convene his personal desire to retaliate from Appellant for actions brought to U.S. Courts for his misconduct. The whereabouts of complainants were only known to Prosecutor. Prosecutor submitted divorce judgment of Kahwaji without disclosing how she obtained it. Prosecutor insisted to charge Appellant of not filing I-130 by Kahwaji's wife. The attorney's check that made the payment of the filing fee by Appellant was ignored and concealed by Prosecutor. The Immigration officer who testified without the file stated that I-130 was not filed. This could not be verified without the presence of the file.

This attorney was charged with Disciplinary misconduct when he was following the instructions of U.S. Immigration Service as to applications of the then new law of Legalization.

b) **The case of Al-Omari:** This is a case where there was no complainant and Mrs. Al-Omari did not appear at trial. Action in this case was started by Prosecutor herself. It is unlawful to have

brought to trial the new lawyer who was substituted by Order of the Surrogate Court. Appellant was denied his right to confront the witness. Mrs. Al-Omari was subject of criminal investigation in U.S. Immigration and the Yemeni government. Mrs. Al-Omari has disconnected her telephone and left the United States as I was informed by the insurance company.

c) **The case of the Gallardos:** I was denied confrontation of witness as Mr. Galardo did not appear. Appellant had considerable dealing with him and a relationship of good terms. The Gallardos did not disclose that they had any children from this marriage, while the papers submitted by the new lawyer disclose one child of the marriage. The absence of the husband at my trial is unexplained and denies me the right to confront him with his wife's accusations.

Accusations to Appellant that he did not return documents belonging to clients is untrue. All documents were returned to clients as soon as they were approved by the Immigration Service. Had these complainants not been concealed by Prosecutor, it would have developed at trial that they committed fraud on INS.

The Hearing Panel's violation of substantial procedural Disciplinary Rule, namely 22 NYCRR 605.22(c) denied Appellant procedural due process of law. The rules and procedures of the Departmental Disciplinary Committee for the First Department have been promulgated in 605 of the Rules of the Appellate Division. Section 605.22(c), dealing with quorum requirements during disciplinary hearings, states in part as follows:

> All matters presented to a hearing panel shall be determined by three members of the panel. Two panel members assigned to a matter shall constitute a quorum for the transaction of business. All actions shall require the concurrence of at least two members. At least two members of a hearing panel assigned to a matter shall have heard the entire proceeding. The

> third assigned member either shall have heard the entire proceeding before the hearing panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard.

22 NYCRR Section 605.22(c) can be divided into two very distinct parts, both requirements of which be completely satisfied for the hearing to comply with the mandate of this section.

The first part requires that at least three members of the hearing panel assigned to the matter shall have heard the entire proceeding before the hearing panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard. The second part requires that at lease two members of the hearing panel assigned to the matter shall have read the entire proceeding before the hearing panel.

Here, four members were originally assigned to serve on the Hearing Panel of the DDC, namely: Sheldon H. Elsen, Esq., John M. Delehanty, Esq., Prof. Beatrice S. Frank and Susan Welsher. John M. Delehanty, Esq. never took part in the hearings or in the findings of the Panel. Therefore, Mr. Elsen, Prof. Frank and Ms. Welsher were the only members of the panel to actually serve.

In order to fulfill the first part of 22 NYCRR Section 605.22(c), Mr. Elsen, Prof. Frank and Ms. Welsher all must have heard the entire proceeding before the Hearing Panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard.

It is not disputed that Shelden H. Elsen, Esq., as the Hearing Panel Chair, heard the entire proceeding. Prof. Frank was present at the opening of each session of the hearing, but she left halfway through the first session on April 20, 1992. Prof Frank missed a portion of Appellant's direct and cross examination, although it was stated on page 3 of the transcript that Prof. Frank intended to read the transcript of whatever part of the hearing she missed. Therefore, it

can be assumed that Prof. Frank did just that and therefore fulfilled the initial requirement.

Susan Welsher was present at the opening of each session of the hearing, but she left during the second session on April 27, 1992, and was absent during the testimony of Ivan L. Van Leer concerning the Al-Omari matter. On page 346, line 24 to page 347, line 3 of the transcript, which was during the third session of the hearings on May 11, 1992, Ms. Welsher stated:

> I have no Al-Omari papers at all. If you remember, I left early last—I only have 36 which you distributed today.

The court should note that during Van Leer's testimony, 20 Staff exhibits were received in evidence. There is no indication in the record that Ms. Welsher read the transcript of Mr. Van Leer's testimony, in which case the requirement of the first part of 22 NYCRR 605.22(c) was not met. Thus, if Ms. Welsher failed to read the transcript of the testimony which she was not present for, then the hearing was defective since it violated the 22 NYCRR 605.22(c) requirements.

However, even if it can be shown that Ms. Welsher did read the transcript, the requirements of the second part of 22 NYCRR 605.22(c), which requires that at least two members of the hearing panel assigned to the matter shall have heard the entire proceeding before the hearing panel, must also be fulfilled.

As was previously stated, there is no dispute that Shelden H. Elsen, Esq., as a Hearing Panel Chair, heard the entire proceeding. Moreover, Prof. Frank was present for all three sessions of the hearing, although she left halfway through the first sessions on April 20, 1992. In the Appellate Division's per curiam decision it was held that since Appellant did not object or otherwise raise the quorum issue when this happened, pursuant to 22 NYCRR 605.1(b), it must be disregarded as a nonprejudicial irregularity in

procedure. However, at the time Prof. Frank left, there was no reason to object since both Mr. Elsen and Ms. Welsher were still sitting for the session.

As Mr. Elsen, Hearing Panel Chair, explained on page 3, lines 4 to 19 of the transcript:

The rules of this Disciplinary Committee are that we may proceed with a panel of two.

Mr. Delehanty is on trial and professor Frank will be here for half the session, but then Ms. Welsher and I will continue and we will constitute a quorum. The rules also are that other members of the Panel may join us on condition that they read the transcript which Professor Frank and Mr. Delehanty propose to do.

If Mr. Delehanty's trial keeps him out too long, I don't know if he will continue with this, but Professor Frank definitely intends to stay with this through the balance of the hearing.

Thus, there was no reason for Appellant to object at the time Professor Frank left the first session.

First of all, Appellant did not object at the time of Ms. Welsher's departure because he was following the guidelines laid out to him at the start of the first session by Mr. Elsen, the Hearing Panel Chair, at page 3, lines 4 to 6 of the transcript:

The rules of this Disciplinary Committee are that we may proceed with a panel of two.

Since Mr. Elsen and Prof. Frank were still present for the rest of the second session, it was Appellant's belief that there was no reason to object to Ms. Welsher's departure.

Furthermore, 22 NYCRR 605.1(b) states in pertinent part:

The Committee will not hold action of a Hearing Panel invalid by reason of any *nonprejudicial* irregularity. Any error, defect,

irregularity or variance, which does not affect *substantial rights* shall be disregarded (emphasis added).

In the present case, the procedural irregularities of the Hearing Panel have, in fact, affected Appellant's right to due process and so these irregularities are prejudicial and should not be disregarded.[1]

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[1] The two-pronged test of 22 NYCRR 605.22(c) is similar to that of New York Criminal Procedure Law 190.25(1), which governs the general proceedings and operation of the Grand Jury.

CPL 190.25(1) states:
Proceedings of the grand jury are not valid until at least 16 of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least 12 members thereof.

The Court also held that the Grand Jury is privileged to return an indictment so long as at least 12 of the grand jurors who voted to indict heard all the essential and critical evidence. See also *People v. Collier*, 72 NY2d 298 (1988).

In the present case, the first prong of 22 NYCRR 605.22(c) requiring a panel of at least three members of the hearing panel to have heard or read all of the proceedings, can be compared to the provision in CPL 109.25(1), which requires that at least sixteen grand jurors be present during a grand jury proceeding in order to furnish reasonable protection against malicious and unfounded prosecutions and yet create a Grand Jury small enough to permit to perform its duties efficiently, *People v. Infante*, supra 89.

The 22 NYCRR 605.22(c) requirement has the same effect by requiring at lease three people so that it may furnish reasonable protection against malicious and unfounded disciplinary sanctions and yet create a Hearing Panel small enough to permit it to perform its duties efficiently.

Furthermore, even if the first prong is satisfied, the second prong of 22 NYCRR 605.22(c) requiring at lease two members of the hearing panel to have been present for and have heard the entire proceedings can be compared with the provision in CPL 190.25(1), which requires that at least twelve grand jurors have

In the present case, Appellant is respectfully requesting an order granting him leave to appeal to the United States Supreme Court from the order affirming the Report and Recommendations of Hearing Panel whose procedures violated 22 NYCRR 605.22(c), a rule promulgated "to reach a just and proper determination of matters brought to the attention of the Office of Chief Counsel or the Committee," as stated in 22 NYCRR 605.1(b).

Sheldon H. Elsen, Esq., Hearing Panel Chair, summed up the entire hearing panel proceeding as follows on page 503, lines 10 to 15 of the transcript:

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heard all the essential and critical evidence in order to be eligible to vote whether or not to indict someone.

The court in *People v. Infante*, supra at 88-89 stated, "the Grand Jury must be instructed that 'those grand jurors, who join in an indictment must have been present and must have heard the essential and critical evidence' in those cases 'where the presentation to the Grand Jury is continued beyond one day and the composition of the panel may, therefore, vary on succeeding days,'" quoting from *People v. Colebut*, 86 Misc.2d 729, 735.

In the present case, the second prong of 22 NYCRR 605.22(c) requires that "[a]t least two members of a hearing panel assigned to a matter shall have heard the entire proceeding." There is no dispute that this requirement was not met satisfied by Hearing panel. Although Sheldon H. Elsen, Esq., heard the entire proceeding, both Professor Beatrice S. Frank and Susan Welsher were not present for certain parts of the proceeding, and John M. Delehanty, Esq., never attended any part of the proceeding. Thus, only one member of the Hearing Panel assigned to Appellant's matter heard the entire proceeding, thereby violating the second prong of NYCRR 605.22(c).

The present case is similar to *People v. Phipps*, 170 AD2d 220 (1st Dept. 1989) in which the court "determined that there was a question as to whether the vote (to indict defendant) was taken of al least 12 grand jurors who have heard all of the essential testimony" and so the indictment was dismissed and the case remanded to permit the People to establish full compliance with CPL 190.25(1).

> I must tell you, the Panel is, the duty devolves on us and on the Court in a proceeding of this nature to do two things: One is to protect the public, that is our primary duty. The other is to be fair to the lawyer.

The question of law sought to be brought up for review could be formulated as follow:

If a Hearing Panel, assigned by Departmental Disciplinary Committee of the First Judicial Department to conduct hearings into formal charges of attorney misconduct and to make such determinations and to impose such disciplinary sanctions as it may deem appropriate, violates 22 NYCRR 605.22(c), which requires at least two members of a hearing panel assigned to a matter have had heard the entire proceeding, does it violate the due process rights of the attorney who is before the Hearing Panel, just as a grand jury violates a defendant's due process rights if it does not comply with Criminal Procedure Law 190.25(1), which requires at least twelve members of a grand jury to have heard all the essential and critical evidence before they may be allowed to vote whether or not to indict the defendant?

An attorney's due process rights have been violated if the Panel of the Departmental Disciplinary Committee hearing his alleged misconduct violates rules and procedures promulgated to reach a just and proper determination of the matter. Here, Appellant has consistently shown that 22 NYCRR 605.22(c) was violated since at least two members of the Hearing Panel did not hear the entire proceedings thereby denying his right to a fair hearing and his right to due process.

The Appellate Division, in accepting the ruling that a substantial right of trial by a panel composed of one lawyer and two non-lawyers, which is similar to a Jury Trial, is valid in the the absence of one member of the Panel. If a Jury is absent, would a hearing before a Court in criminal trial be valid? In the trial of the

World Trade Center in U.S. District Court, Southern District of New York, the hearing was suspended when one juror was absent.

It is error to rule that the right of trial as provided by law is waived if no objection is made to the lack of quorum. This is a substantial right which cannot be waived. It renders the hearing invalid.

Appellant has been denied the effective assistance of counsel by reason of his hearing attorney's failure to raise a timely objection to the Panel's violation of the quorum rules; introduce evidence of Appellant medical disability and move for his suspension based thereon and to introduce evidence in mitigation available to him.

A review of the record discloses that Appellant's hearing attorney committed several errors which seriously prejudiced him and denied him of the effective assistance of counsel in his disciplinary proceeding.

The failure to raise a timely objection to the Panel's violation of quorum rules. As previously addressed, the Hearing Panel clearly violated the Appellate Division rules regarding the quorum requirements. While the Appellant has argued herein that his attorney did not object to the Panel's violation of the quorum requirements during the course of hearings in which they occurred, the Appellate Division nevertheless found in effect that the Appellant waived his right to raise the violation of the quorum rule by reason of his attorney's failure to make a timely objection:

We reject respondent's claim that the report should be disaffirmed because of non-compliance with Section 605.22(c) of the Court's rules relating to a quorum. No objection was taken. Nor was the issue raised when either of the Panel members left the room.

(See Exhibit C, Decision of the Appellate Division at page 6.)

If the Appellate Division is correct that the failure of his hearing attorney to raise objection to the quorum violation precludes his argument of that point, then clearly his attorney committed an error

which can only be characterized of having deprived him of the effective assistance of counsel.

Moreover, the Appellate Division opinion attempts to characterize this issue as *de minimus*. The court noted in its decision that the Panel's findings should not be invalidated by this irregularity, citing 22 NYCRR 605.1(b), which permits a finding to stand where any irregularity is "non-prejudicial" and one which "does not affect substantial rights ."

It is obvious that the violation of the quorum rule by the Hearing Panel did cause a substantial prejudice to the Appellant and as such substantially affected his right to a full and fair hearing pursuant to the requirements of due process. The quorum rules were set up to assure that the majority of the Panel were fully aware of the extent of the evidence and arguments, thus a violation of those rules effectively denies the Appellant a fair hearing.

If Appellant was precluded from raising the quorum violation by the Appellate Division, and absent that argument, the result is that he has been disbarred, then clearly he has been prejudiced by reason of his counsel's failure to raise that objection.

Failure to introduce medical evidence and move for Appellant disability suspension. The evidence available at the time of the hearing to Appellant's then attorney amply established that the he had been suffering from medical disabilities for many years and that his condition was then such as to render him incapable of assisting in his own defense. However, Appellant's attorney failed to introduce at the hearing any competent medical evidence tending to establish the extent of Appellant's medical disability, of which counsel was aware, either as a factor in mitigation of the charges — it is well established that physical disability casually related to the misconduct will be considered as a mitigation factor (*Matter of Levine*, 101 AD 2d) — or as the basis for a motion for Appellant's medical suspension upon the grounds that his condition "makes it

impossible for the the Appellant adequately to defend himself ..." [22 NYCRR 603.16(c)(1)].[2]

Indeed counsel to the Petitioner Committee was well aware of the extent of the Appellant's medical disability as early as May 1991, when the Appellant appeared before Prosecutor and submitted to depositions concerning pending complaints.

MS. EDELSTEIN: Well let me address the health issue.

Mr. Ghobashy did come to an EBT. He did submit testimony as to his medical condition. He may still have a serious medical condition. I trust he does have a severe medical condition.

Further, upon information and belief, Staff Counsel directly advised Appellant's hearing attorney of the his right to seek a medical suspension, at or about the time of the hearings. Indeed, in its report to the Appellate Division, the Hearing Panel commented specifically on the Appellant's instability at the time that he testified before the Panel:

> Respondent's lengthy testimony before the Hearing Panel was rambling and often incoherent...[3]

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[2] Section 603.16 specifically provides a procedure for determining whether a respondent is incapacitated by reason of a physical or mental disability from defending himself in disciplinary proceedings or continuing to engage in the practice of law. A petition under this section may be made either by the Disciplinary Committee, which may result in an independent examination of the Respondent, or by the respondent himself. If it is determined that the respondent suffers from such a disability, he shall be suspended indefinitely based thereon.

[3] As a result of the information provided to Staff Counsel and the conclusion drawn by the Hearing Panel itself, namely that Respondent was suffering from a severe medical disability, it would appear that counsel should have undertaken to bring on a proceeding under 603.16 to determine Respondent's capacity.

On the occasion of the motions in the Appellate Division with regard to the Hearing Panel's report, Appellant's appellate attorney introduced for the first time evidence of his medical disability, namely affidavits of his physicians, Michael Eufemio and Leonard Dire (those affidavits are annexed as Exhibit D. Dr. Eufemio stated that Appellant had been a diabetic for some ten years and had been under his care for two and one half years. The physician noted that the Appellant's blood sugar levels were extremely high and as a result in February 1992, he was admitted to New Rochelle Hospital. Further, the doctor stated that that condition, namely high blood sugar level, "can be a cause of negative psychological responses. ....In my opinion, Mr. Ghobashy's high blood sugar may have contributed to his behavior."

The affidavits further established that the Appellant suffered a myocardial infraction which was complicated by congestive heart failure on or about June 12, 1992, for which he was hospitalized for a period of two weeks. Though not specifically stated in the medical report, it would certainly seem apparent that the heart attack suffered by Appellant on June 12 was in part as a result of his long-standing diabetic condition, a condition which Dr. Eufemio stated "produces mood changes and feelings of irritability, anxiety, depression, and changes in personality and conduct".

Clearly Appellant has been severely prejudiced by the failure of his hearing attorney to put his medical condition in issue for the purpose of establishing that condition as a factor in mitigation of the charges and as a basis upon which to establish that Respondent was incapable of adequately defending himself against the charges.

The failure to offer substantial evidence in mitigation. The Hearing Panel, in its report to the Appellate Division, found specifically that "no persuasive evidence was offered in mitigation .." on Appellant's behalf, a factor which no doubt was critical in the Panel's determination to recommend that Appellant be disbarred.

In fact, substantial evidence in mitigation was known to and available to Appellant hearing counsel, namely as follows:

Although Appellant's counsel offered testimony of two character witnesses, one of whom was the Appellant's daughter, he failed to introduce any other evidence tending to mitigate the charges. Such evidence was available, through the testimony of Appellant himself with any supporting documentation which would be deemed appropriate, as follows:

The Appellant had served as a foreign service officer and member of the Egyptian delegation to the United Nations and the United Arab Republic Consulate General in New York. He was the author of over 29 articles and books on international law and foreign affairs, both in English and Arabic. He had lectured the Green Berets at East Carolina College at Fort Braff in 1965 on Middle East affairs and served as a consultant on international law and United States affairs. Further, he successfully represented the six-nation Iroquois Indians in New York, Canada and represented their interests in both Washington, and Albany, which was done on a pro bono basis.

Following the Appellant's arrival in this country in 1949, he received a Master of Arts degree from Columbia University and subsequently (1955) was the recipient of a Ph.D. degree in international law from New York University (his law degree was from Brooklyn Law School). Furthermore, in December 1991, the Appellant was invited to serve as a judge of International Eastern Regional Moot Court Competition.

Had this evidence in mitigation been offered and received, it is more than likely that the end result, namely Appellant's disbarment, would have been otherwise, either as a result of a lesser sanction or as a result of a finding of medical disability. Appellant's counsel failed to introduce this evidence is clearly indicative of his ineffectiveness on Appellant's behalf.

At time when Appellant was confined to hospital with a heart attack, and being the time to submit an appeal, Appellant was not able to assist in his defense, as he was informed by Fredrick Lewis, Esq., appeal attorney, that Staff Counsel refuses to consent to an adjournment.

WHEREFORE, Chief Justice Murphy of the Appellate Division, First Department cannot decide a case involving Disciplinary Panel that he appoints.

It was error for New York State Court of Appeals to decide to decline a review on ground that order of the Appellate Division is not a final order when this Court has consistently ruled otherwise.

The Prosecutor concealed the appearance of complainants and thus denied Appellant the right to cross examine them.

The absence of members of the Disciplinary Panel renders the hearing invalid and it is error for the Appellate Division to state that it can be waived.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the New York State Court of Appeals in this matter.

Dated: November 1, 1993.

Respectfully submitted,

Omar Z. Ghobashy
Petitioner, pro se
85 Wildwood Road
New Rochelle, New York 10804
(914) 834-8462

APPENDIX A—NEW YORK STATE COURT OF APPEALS, ORDER

State of New York

Court of Appeals

At a session of the Court held at Court of Appeals Hall in the City of Albany on the ninth day of July 1993

Present, HON. JUDITH S. KAYE, Chief Judge, presiding

1-24 Mo. No. 632

In the Matter of Omar Z. Ghobashy, admitted as Omar Zaki Ghobashy, an Attorney and Counsel-at-Law.

Departmental Disciplinary Committee for the First Judicial Department,

Respondent,

Omar Z. Ghobashy,

Appellant.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the April 27, 1993 Appellate Division order, be and the same hereby is dismissed upon the ground that that order does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

Seal

State of New York

Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION July 9, 1993

1-24 Mo. No. 632

In the Matter of Omar Z. Ghobashy, admitted as Omar Zaki Ghobashy, an Attorney and Counsel-at-Law.

Departmental Disciplinary Committee
for the First Judicial Department,

Respondent,

Omar Z. Ghobashy,

Appellant.

Motion, insofar as it seeks leave to appeal from the April 27, 1993 Appellate Division order, dismissed upon the ground that that order does not finally determine the proceeding within the meaning of the Constitution; motion for leave to appeal otherwise denied.

Motion for a stay dismissed as academic.

APPENDIX B—ARTICLE: "INFORMAL DISCIPLINE IN THE FIRST DEPARTMENT 1991 UPDATE (LETTERS OF ADMONITION)" NEW YORK LAW JOURNAL, OCTOBER 19, 1992

By Hal. R. Lieberman

Informal Discipline in the First Department 1991 Update (Letters of Admonition)

Last year I wrote two articles focusing on "Informal Discipline" as a tool which disciplinary and grievance committees can use effectively to upgrade professional standards. Those articles dealt primarily with relevant procedures in the First Department and also described the substantive bases for many of the 122 letters of admonition and 44 letters of caution issued in 1990.

During 1991 the Departmental Disciplinary Committee (DDC) issued 113 letters of admonition and 22 letters of caution to First Department attorneys. Although it is not possible to discuss all of these actions, or to analyze any of them in great depth, I shall nevertheless again attempt to describe in limited detail representative admonitions and cautions issued in 1991 with an eye to shedding further light on the DDC's view of the conduct in question and its relationship to various provisions of the Lawyer's Code of Professional Responsibility. This article, the first of two, focuses on the admonitions.

As in 1990, "neglect," and the related failure zealously to pursue a client's cause, were by far the most common grounds for issuing an admonition to First Department lawyers. In fact, 68 of the 113 lawyers admonished in 1991 were sanctioned on account of violations of DR 6-101(A)(3) or DR 7-101(A)(1)(2) and (3), a sizable increase in comparison with the 51 similarly admonished for "neglect" in 1990. This is an alarming development which, if it becomes a trend, will have significant negative consequences for the bar in this jurisdiction.

❦ ❦ ❦

Confidence and Secrets
(DR 4-101)

Two lawyers were admonished for improperly revealing confidences or secrets. In one case, L. prior to withdrawing as counsel to a client, advised his adversary that his client was "difficult" that his client's counterclaim lacked merit, and showed the adversary confidential correspondence received from the client.

In a second case, L. following his discharge, wrote a letter to his adversary notifying him of the discharge but going further by disparaging his former client's credibility, motives and possible future actions.

❦ ❦ ❦

L., an immigration lawyer, was retained by a client to apply for permanent residence status under the amnesty program; in the course of the application process the client furnished to L. his passport and several other documents; thereafter, a fee dispute arose, the client discharged L., and L. asserted a retaining lien as to the documents and passport, an action which the DDC considered to be a violation of DR 9-102(C)(4) both because the lien was invalidated by a subsequent Small Claims Court action for fees in which the client prevailed (which L. disregarded for a period of time) and also because L. had no right to assert a retaining lien with respect to property such as a passport the other documents which L. held.

❦ ❦ ❦

Conclusion

As can be seen from the foregoing case summaries, in 1991 First Department lawyers violated many different rules set forth in the Code and were formally admonished for doing so. The purpose of this article is to remind lawyers that violations of the same black-letter rules of professional conduct described last year are unfortunately occurring unabated, and that these violations continue to have disciplinary consequences.

APPENDIX C—PROCEEDINGS AND ORDER OF APPELLATE DIVISION

DEPARTMENTAL DISCIPLINARY COMMITTEE OF THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

In the Matter of

OMAR Z. GHOBASHY, Esq.

Respondent.

H.P. No. 70/91

Before a Hearing Panel Consisting of:

Sheldon Elsen, Chair
Beatrice S. Frank
Susan Welsher

REPORT AND RECOMMENDATIONS

Preliminary Statement

The Respondent, Omar Z. Ghobashy, was admitted to practice as an attorney and counselor-at-law by the Appellate Division of the Supreme Court, Second Judicial Department, in June, 1962. At all times relevant to the charges herein he has maintained an office for the practice of law within the First Judicial Department.

The charges are based on complaints involving five unrelated clients who retained and then discharged Respondent. The Panel held three days of hearings which were opened to the public at Respondent's request. Among those who testified were four of the complainants, two of the lawyers who had been substituted for Respondent, the Deputy Director of the New York City office of the

Immigration and Naturalization Service, the Respondent, and character witnesses for the Respondent. Their testimony and the exhibits introduced by both Staff counsel and the Respondent demonstrated a consistent pattern of inappropriate behavior by Respondent.

Respondent has regularly engaged in a pattern of professional misconduct by continuing to hold himself out as his clients' lawyer after he has been discharged by them, threatening them, failing to cooperate with their new attorneys, interfering with representation by new counsel, revealing clients' confidences or secrets learned in the course of his representation, failing to return their property to them, and, most seriously, deliberately or recklessly making false or unsubstantiated prejudicial statements about such clients to government agencies, including the Immigration and Naturalization Service and at least one foreign government, as well as to their new attorneys, their employers, their spouses, courts and others.

Respondent has shown no remorse throughout his extensive testimony, and was not candid with the panel. Most importantly, he did not acknowledge or give any indication that he understood that his conduct violated the Code of Professional Responsibility.

Respondent was formally admonished by the Departmental Disciplinary Committee in August, 1986 for demonstrating his willingness to represent someone he believed to be perpetrating a fraud on the government and again in November of 1986 for making inappropriate accusations of improper conduct by opposing counsel and using strong and accusatory language in letters to the judge in the case.

The Panel unanimously found that the evidence presented supported the charges and that the pattern of behavior which the evidence revealed reflects adversely on Respondent's fitness to practice law. Respondent is a danger to the public; he is a potential source of harm to persons who retain him and he lacks internal

controls to conform his conduct to the norms of professional behavior. The Panel found no mitigating circumstances and recommends that the Respondent be disbarred.

Since Respondent is not subject to an interim suspension, we recommend that the Court take action forthwith to stop him from practicing law.

Background

Four of the matters involved immigration proceedings and the fifth involved an estate.

1. The Gallardos

The Gallardos retained Respondent in or about August, 1987 to appeal the denial of their application for a visa for Mr. Gallardo. In November 1987, after they received an offer for a second interview from the Immigration and Naturalization Service (INS) concerning the legitimacy of their marriage, they asked Respondent to withdraw the appeal. Respondent refused, citing reasons that appear not to be sound. The consequence was that the visa application was not granted until two years later when their new counsel advised them to undergo a second interview.

We do not deem this apparently unsound advice to constitute professional misconduct, but base our findings of misconduct toward the Gallardos solely on what happened thereafter.

From November, 1987 through July, 1989, Respondent failed to respond to the Gallardos' repeated requests for information regarding the status of their case. Mrs. Gallardo testified that when she called to confirm an appointment with Respondent, Respondent's secretary told her that Respondent refused to see them and that he would call the police if they came to his office. In July, 1989 the Gallardos wrote to Respondent discharging him and requesting that all of their papers, which included original personal

financial records, be forwarded to their new attorney. Respondent did not comply and has never complied with this request.

Respondent wrote to the Gallardos, stating that their new attorney was incompetent, predicting that they would fail in their application and threatening to sue them for his fee. (Staff Ex.10). In a letter written on September 13, 1989, he advised them that their new attorney's actions in withdrawing their appeal might subject them to criminal proceedings and Mr. Gallardo to deportation. The record showed no justification for these statements, although Respondent claimed to us that the risk he wrote of was based on the possibility that the INS on remand would make a thorough investigation of the Gallardos. (Staff Ex.11). A copy of the letter is annexed hereto.

Our most serious finding with respect to the Gallardo case is that, on the same day he wrote to new counsel, Respondent also wrote to the Acting Director of the INS, accusing the Gallardos and their lawyer of evading the Marriage Fraud Act by withdrawing their appeal. (Staff Ex.12). The letter, which was either false or without a basis in fact shown by the record before us, implied that the Gallardos' marriage was fraudulent and thus that their immigration status was tainted by fraud. A copy of that letter is annexed hereto.

2. The Hassans

The Hassans retained Respondent in March, 1988 to apply for a visa for Mr. Hassan based on their marriage on January 20, 1987. On April 30, 1988, Respondent advised Mr. Hassan that his petition had been approved and sent to Lima, Peru. In September, 1989 Respondent and Mr. Hassan were advised that the petition had not been received by the American Consulate in Peru.

Mr. Hassan testified that when he went to Respondent's office to ask for an explanation, Respondent cursed him, threatened to call the police and threatened to tell the INS that the Hassans' marriage was fraudulent. There is no credible evidence in the record to support his charge of fraud.

The Hassans engaged new counsel, who wrote to Respondent on September 15, 1989, advising him of the substitution and asking for the file. The Hassans countersigned the letter. Respondent never forwarded the file to the new attorney.

Although there was no factual basis for questioning the legitimacy of the Hassans' marriage, Respondent sent a letter to Mrs. Hassan on September 27, 1989 addressing her by her maiden name. In this letter he referred to the INS and warned of criminal prosecution when family relationships are falsified to obtain visas. (Staff Ex.20). A copy of this letter is annexed hereto. When questioned by the panel as to the factual basis for his belief that the Hassans were engaged in some type of marital fraud, Respondent replied that he based it in part on Mr. Hassan's appearance at his office with a woman other than his wife. According to the testimony before us, this woman was a fellow employee of Mr. Hassan. There was no credible evidence that would afford any basis for Respondent's serious charge of fraud against these clients.

Respondent then transmitted that charge of fraud to the new attorney by sending the new lawyer a copy of Respondent's letter to Mrs. Hassan, in which he made the charge. In his letter to the new attorney, Respondent also questioned the genuineness of Mr. Hassan's signature on the letter of September 15, asked the new attorney about her connection with Mrs. Hassan and stated that the new attorney should answer promptly for her own protection. The record shows no basis for these statements. He asked the new attorney to remit the balance of his fee to insure the release of the Hassans' papers to her. (Staff Ex. 21). A copy of the letter is annexed hereto.

Respondent wrote a letter dated October 10, 1989 to Mr. Sherif Omar, Ambassador and Consul General of Egypt, which accompanied a memorandum in which Respondent asked that the Consulate deny Mr. Hassan new passport or withdraw any passport he obtained through forgery, and give him a document valid only

for travel to Egypt, since he was evading the draft. We have no evidence showing that such a charge was true. Again, with no factual basis shown by the record before us, Respondent further alleged that Mr. Hassan had "committed forgery in immigration here and he is under investigation." (Staff Ex. 25). This letter, which was written in Arabic, is annexed hereto, together with an English translation by a translator retained by Staff counsel, and a longer Arabic version, together with a translation of the latter submitted by Respondent.

3. Mamdoud ElDeeb

In December, 1989 Respondent was retained to represent Mr. ElDeeb before the INS in his application for permanent residency status based on his employment as a physiotherapist at the Bronx Lebanon Hospital Center. The retainer agreement provided for payment of $750.00 in advance, $500.00 on approval of the application, $500.00 upon the INS interview, plus filing fees. Mr. ElDeeb paid Respondent $800.00 on signing the retainer. At that time Mr. ElDeeb had already obtained permission for a temporary stay. Mr. ElDeeb testified that he then prepared his own application to extend the period of the stay and was instructed by Respondent to file this application with the INS, which Mr. ElDeeb did.

In May, 1990, Mr. ElDeeb discharged Respondent and retained a new attorney, who wrote to Respondent on May 18 advising him of the substitution, enclosing a signed authorization and asking Respondent to Forward the file. Respondent then wrote to the new attorney stating that he would forward the file when he received his fee of $1,085.00 and that he would sue and notify the hospital if payment was not received.

On May 23, 1990 Mr. ElDeeb wrote to Respondent expressing dissatisfaction with Respondent's representation and his ethics, asking for the return of his file and his money or documentation of any amount Respondent felt was owed to him. In this letter he advised Respondent that he would complain to the Departmental

Disciplinary Committee if Respondent continued to refuse to communicate with him.

Despite the notification that he had been discharged, Respondent filed a petition for labor certification on Mr. ElDeeb's behalf with the INS, on or about May 26, 1990. Respondent then wrote to the Employment Specialist at the hospital where Mr. ElDeeb was employed, advising her that Mr. ElDeeb owed him money for legal services and stating that Mr. ElDeeb might be subject to deportation for overstaying his visa and for unauthorized employment. He further stated that because Mr. ElDeeb had not followed Respondent's advice, but had followed other advice or acted on his own, Mr. ElDeeb would not be eligible to adjust his status and would have to go to Egypt. This could result in a six month delay or in his failure to qualify for permanent employment. Finally, Respondent stated to this employer of his former client that he might sue Mr. ElDeeb for libel and slander and that unless the Employment Specialist sent a letter to Respondent disassociating herself from Mr. ElDeeb's letter, the hospital would be liable, since Mr. ElDeeb had used hospital stationery in correspondence with Respondent. (Staff Ex. 65). A copy of this letter is annexed hereto.

Mr. ElDeeb complained to the Departmental Disciplinary Committee in June, 1990. In September, 1990 Respondent brought a Civil Court action against Mr. ElDeeb for legal fees plus counsel fees. Mr. ElDeeb counterclaimed for the return of part of the fee he had paid to Respondent and for counsel fees. Respondent moved for summary judgment and for sanctions against Mr. ElDeeb and his attorney on the grounds that the counterclaim and defense were frivolous.

In an affirmation in support of his motion, Respondent falsely claimed, among other things, that Mr. ElDeeb had filed a complaint with the Departmental Disciplinary Committee which Mr. ElDeeb realized to be frivolous, and that Mr. ElDeeb had failed to submit to conciliation and had abandoned his complaint. He further affirmed

that Mr. ElDeeb's new attorney fraudulently took over his immigration case to do nothing and charge him an illegal fee, and Respondent falsely claimed that the attorney had urged Mr. ElDeeb to file the complaint and had advised him not to proceed with mediation. (Staff Ex. 70). A copy of that affirmation is annexed hereto.

Mr. ElDeeb opposed the motion and asked for sanctions against Respondent for his erroneous representations to the Court. Respondent's motion for summary judgment was denied with the court reserving decision on sanctions. A Civil Court arbitrator decided the matter in Mr. ElDeeb's favor on the grounds that Respondent had no cause of action, but imposed no sanctions on either party. Respondent claims that he has demanded a trial *de novo*, but a search of the records by the Deputy Chief Clerk of the Bronx County Civil Court has found no record of such a demand. (Staff Ex. 73). A copy of the Clerk's certificate is annexed hereto. Respondent has not forwarded Mr. ElDeeb's file to his new attorney.

4. Sydney Lanier Fortner and Samir Kahwaji

In April, 1985, Mr. Kahwaji and Ms. Lanier retained Respondent to file a "relative petition" for a visa for Mr. Kahwaji, based upon their marriage. They met with Respondent and at his request gave him original documents, including birth certificates and their marriage license. On or about May 10, 1985 Respondent prepared the petition and a notice of appearance. Respondent thereafter failed to respond to their repeated inquiries regarding the status of their petition.

At the hearing before the Panel, James Scott Blackman, Deputy District Director of the INS office in New York City, testified that when he examined Mr. Kahwaji's file there was no evidence that a relative petition had ever been filed. (Tr.,p.353).

In a letter dated April 8, 1987 Mr. Kahwaji and Ms. Lanier discharged Respondent and requested the return of their original

documents and other papers. Respondent has never returned these documents to them.

In spite of the fact that he had been retained to file the relative petition, had subsequently been discharged from this representation and had never been authorized to file an application for Mr. Kahwaji under the legalization program. Respondent wrote to Mr. Kahwaji telling him that he had scheduled an appointment for Mr. Kahwaji on May 8 in connection with a legalization application. On April 20 Ms. Lanier again wrote to Respondent, notifying him that he was to stop any further action on their behalf and asking him to forward their file to their new attorney.

On April 20 Respondent wrote to Mr. Kahwaji telling him that he would be deported, that his relative petition would be denied, and that if he did not appear at Respondent's office without his wife he would be arrested and deported. Respondent also said that Mr. Kahwaji would forfeit his opportunity to apply under the legalization program. (Staff Ex. 55). A copy of that letter is annexed hereto. The record shows no basis for Respondent's statements.

Respondent continued to disregard the letters dismissing him and continued to hold himself out as Mr. Kahwaji's attorney. On June 12 he wrote a letter advising the INS that Mr. Kahwaji had failed to appear for a legalization appointment and that accordingly it would be necessary to reschedule a deportation hearing for him. (Staff Ex.57). A copy of this letter is annexed hereto.

On December 12 Respondent sent a letter to the Director of the Legalization Office of the INS. In this letter he advised the Director that another representative of Mr. Kahwaji had applied for legalization because Respondent had confronted Ms. Lanier as to the validity of the marriage. He further advised the Director that Mr. Kahwaji had a prior arrest in Maryland and that, in a petition for political asylum, Kahwaji had stated that he was a member of the Moslem Brotherhood, which Respondent described as "a subversive

and terrorist organization close to Islamic fundamentalist in Iran." (Staff Ex. 58). These statements, if true, would nevertheless be grossly violative of his clients' interests. A copy of that letter is annexed hereto.

5. Nawal Al Omari

Mrs. Al Omari retained Respondent in or about June 1988 to represent her as administratrix of her husband's estate. Respondent prepared a petition to the Surrogate's Court to have Mrs. Al Omari appointed administratrix. Letters of Administration were granted in January 1989.

In September, 1990 Mrs. Al Omari notified Respondent that she wished to discharge him. Mr. Van Leer, her new counsel, forwarded duly executed consent forms to Respondent and requested that Respondent forward all pertinent papers to him. Respondent wrote to Van Leer on October 29, claiming that he could not be removed from the case "without payment of fee by Court order of $10,000.00." He further claimed that in a dispute involving alleged heirs of her husband, the claim had been rejected and an accounting had been approved with an award of counsel fees (Staff Ex.32). A copy of this letter is annexed hereto.

Van Leer testified before the Panel that contrary to Respondent's claim in this letter, the dispute involving the alleged heirs was not resolved and that currently he was preparing to go to trial in the matter. (Tr.,p.277). In addition, a statement by the Chief Clerk of the Surrogate's Court, Westchester County, was introduced into evidence certifying that after searching the records he had found no "record or entry of a decision, order or judgment of the court awarding a legal fee to Omar Z. Ghobashy, Esq." (Staff Ex.44). A copy of that certificate is annexed hereto. After hearing this testimony and reviewing the certificate, we do not credit Respondent's version.

On October 20, Respondent served a " Notice of Attorney's Lien" on Mrs. Al Omari and her tenant demanding that all rents be paid to Respondent. The notice stated that "The Fee by Surrogate Court is $9500.,00 [sic]." (Staff Ex.31). A copy is annexed hereto.

In response to a November 18 letter from Mrs. Al Omari repeating the notice that another attorney had been substituted for him, Respondent wrote to Mrs. Al Omari on November 27, stating that he rejected her letter. He advised her that unless his fee was paid and without a court order she could not substitute another attorney for him. He went on to write that the client had 15 days to pay his fee, and that he would soon execute on the house and sell it. He further claimed that he had rejected her consent to the substitution of attorneys and falsely stated that the Court did not accept it. The letter made further false or dubious claims, among them that she may be subject to criminal investigation and that the INS would contact her. (Staff Ex. 34). A copy is annexed hereto.

In a January 19 letter to Mrs. Al Omari, Respondent again falsely stated that Van Leer was " rejected by the Court" and charged that Van Leer was being paid by the lawyers for her adversaries in the pending case involving the alleged heirs. He predicted, without any basis shown by the record, that she would end up in prison. (Staff Ex. 45). A copy of this letter is annexed hereto.

At the hearing before the Panel, Van Leer testified that in view of Respondent's refusal to be substituted, the Surrogate's Court advised him to make a motion for substitution. In his affirmation in opposition to the motion, Respondent claimed, without any basis shown by the record before us, that Van Leer intended to destroy Mrs. Al Omari's "solid case", obstruct justice and interfere in criminal proceedings and asked that sanctions be imposed on Van Leer. (Staff Ex.36). A copy of his affirmation is annexed hereto.

At the hearing on the motion, Respondent consented to the substitution and the motion to substitute Van Leer for Respondent was granted.

While this motion was pending, Respondent petitioned the Court to remove Mrs. Al Omari as administratrix on the grounds that she was no longer qualified to serve as fiduciary for the estate, and have the Public Administrator, with himself as counsel, substituted for her. Surrogate Albert J. Emanuelli denied the petition, noting that by pursuing this application while resisting the efforts of other counsel to replace him as Mrs. Al Omari's counsel, Respondent had engaged in an obvious conflict of interest which was either the result of Respondent's "ignorance or is a blatant example of frivolous conduct on his part." (Staff Ex. 39). A copy of the Surrogate's opinion is annexed hereto.

Discussion

The testimony and evidence presented at the Panel hearings demonstrated a consistent pattern of behavior by Respondent. After he had been notified that his clients had discharged him he disregarded the notice, refused to return the clients' documents to them, continued to hold himself out as their lawyer and took unauthorized action on their behalf, threatened them, and, most seriously, deliberately or recklessly made false or unsubstantiated prejudicial statements about them to the INS, a foreign government, their employers, their new attorneys, their spouses and others. In these letters and in his affirmation to the Surrogate's Court in the Al Omari case and in his affirmation to the Civil Court in the ElDeeb case, he made statements that, based on the record before us, we conclude he had no basis to believe were true.

Respondent's lengthy testimony before the Panel was rambling and often incoherent, and in some particulars we found it to be

unbelievable. He repeatedly failed to justify his serious public charges against his clients.

Evidence was also presented which demonstrated that Respondent had neglected a client matter before he was discharged. The Deputy District Director of the INS office testified that the Kahwaji file contained no evidence that a relative petition had ever been filed despite the fact that Respondent had been retained to file a relative petition and his clients had been led to believe that such a petition had been filed. There was further testimony that Respondent refused to respond to client inquiries regarding their matters, and abusively rejected his clients' requests for information about their cases.

In several instances Respondent claimed that the special rules of practice relating to immigration matters required that he act as he did with respect to his clients. The Panel found this claim to be without merit. No rules of practice would ever justify the false, reckless and prejudicial statements Respondent made about his former clients, or the baseless statements about them and their new attorneys which he affirmed to a court. Nor do any rules of practice justify his failure to cooperate with their new attorneys or to return their documents to them.

Respondent showed no awareness of the most basic norms of professional conduct. He seemed to feel free to make serious charges against clients, without awareness of the limitations on such disclosures. In his case, these nuances are swept away by our findings that such charges against his clients were not based on fact but were either invented or based on surmise without a factual foundation.

He also did not understand that an attorney's lien against a former client's papers did not entitle him to continue the client's representation.

Recommendation

The Panel found that all of the charges relating to misconduct discussed, with the exception of that part of Charge Eleven which charges physical abuse, were sustained.[1]

No persuasive evidence was offered in mitigation, and Respondent's testimony led us to the conclusion that he would repeat his conduct in the future unless restrained.

For the reasons set forth above, the Panel recommends to the Appellate Division of the Supreme Court, First Judicial Department, that Respondent be disbarred, and further recommends that the Court take steps immediately to stop him from practicing law.

DATED: New York, New York
June 8, 1992

/s/ Sheldon H. Elsen, Chair
Sheldon H. Elsen, Chair

[1] As to the charge of disclosing clients' confidences and secrets, while we were not sure that he violated clients' confidences in many cases, since he appears to have made up what he said, not received it from clients, he clearly violated clients' secrets, for he used against his clients matters which he had learned while representing them.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 14, 1993

Present - Hon. Francis T. Murphy, Presiding Justice
E. Leo Milonas
Ernst H. Rosenberger
Bentley Kassal
Israel Rubin, Justices

In the Matter of Omar Z. Ghobashy, admitted as Omar Zaki Ghobashy, an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner,

Omar Z. Ghobashy, Esq.,

Respondent

M-3194

The Departmental Disciplinary Committee for the First Judicial Department, by Hal R. Lieberman, its attorney (Mady J. Edelstein, of counsel), having presented a petition to this Court, on July 13, 1992, seeking an order pursuant to 22 NYCRR §603.4(d) confirming the Hearing Panel's Report and Recommendation that respondent Omar Z. Ghobashy (who, as Omar Zaki Ghobashy, was admitted to practice as an attorney and counselor-at-law in the State of New York on June 20, 1962, at a Term of the Appellate Division of the Supreme Court, Second Judicial Department), be disbarred based upon the Hearing Panel's determination that respondent was guilty of professional misconduct.

And respondent having appeared herein by Fredric Lewis, his attorney, and having interposed an answering petition, seeking: disaffirmance of the Hearing Panel's report; dismissal of the charges

or, in the alternative, a new hearing; and suspension of any further proceedings in this matter until respondent is physically capable of assisting in his own defense.

And petitioner having interposed a reply in opposition to the answer of respondent and in further support of the petition,

Now upon reading and filing the papers with respect to the petitions, and due deliberation having been had thereon, and upon the Opinion Per Curiam filed herein, and this Court having found and determined that respondent is guilty of eleven charges of professional misconduct arising from his representation of five clients, has offered no mitigation for his actions, and was not candid with the Panel, and this Court having rejected respondent's claim that the report should be disaffirmed because of non-compliance with §605.22 (c) of the Court's Rules relating to a quorum, it is, therefore, unanimously

Ordered: that the Departmental Disciplinary Committee's petition is granted, the findings of fact and conclusions of law of the Hearing Panel are confirmed, and said respondent is disbarred from practice as an attorney and counselor-at-law in the State of New York; that respondent's name be struck from the roll of attorneys and counselors-at-law in the State of New York; that said respondent be and hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another; that said respondent be and hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority; that said respondent be and hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto; and that said respondent be and hereby is directed, within 30 days of the date of this order, to fully comply with the provisions of Title 22, Section 603.13, of the Rules of this Court, a copy of which is annexed hereto and made a part hereof, all effective immediately, and it is further unanimously

Ordered: that respondent's petition to disaffirm the findings of the Hearing Panel be and the same hereby is denied.

Enter:

/stamped/ Catherine O'Hagan Wolfe
Deputy Clerk
Clerk

Supreme Court, Appellate Division

FIRST DEPARTMENT, JULY 1992

/stamped/ Jan 14, 1993

Francis T. Murphy, Presiding Justice
E. Leo Milonas
Ernst H. Rosenberger
Bentley Kassal
Israel Rubin, Justices.

In the Matter of Omar Z. Ghobashy, admitted as Omar Zaki Ghobashy, an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner,

against

Omar Z. Ghobashy, Esq.,

Respondent.

M-3194

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar at a Term of the Appellate Division of the Supreme Court for the Second Judicial Department on June 20, 1962.

Mady J. Edelstein, of counsel (Hal R. Lieberman, attorney) for petitioner

Fredric Lewis, attorney for respondent.

Motion No. 3194 - July 13, 1992

In the Matter of Omar Z. Ghobashy, an Attorney

PER CURIAM

Respondent, Omar Z. Ghobashy, was admitted to the practice of law by the Second Judicial Department on June 20, 1962 under the name of Omar Zaki Ghobashy. At all times relevant herein respondent has maintained an office for the practice of law within the First Judicial Department.

On January 10, 1992 respondent was served with a notice and statement of charges asserting that he had violated various Disciplinary rules in the course of representing five clients (four immigration cases, one estate matter) and that respondent was guilty of unethical practices and professional misconduct.

Charge one alleged that, by making false and misleading statements to his clients and to the third parties in the course of representing five clients, respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A) (4) of the Code, as it existed prior to the 1990 Amendments.

Charge two alleged that respondent intentionally and recklessly prejudiced or damaged four immigration clients by making false and misleading statements about them to third parties in violation of DR 7-101(A) (3).

Charge three alleged that respondent knowingly revealed the confidences or secrets of the four immigration clients to their disadvantage in violation of DR 4-101(B) (1) and (2).

Charge four alleged that respondent neglected three of the immigration cases in violation of DR 6-101 (A) (3).

Charge five alleged that respondent improperly refused to withdraw after being discharged by all clients in violation of DR2-110(B) (4).

Charge six alleged that respondent failed to cooperate with succeeding counsel and attempted to interfere with new counsel for all five clients in violation of DR 2-110(A) (2).

Charge seven alleged that respondent threatened one of the new counsel and an employer of one of the clients with adverse action if they complained to the Departmental Disciplinary Committee (DDC) in violation of DR 1-102(A) (5).

Charge eight alleged that, by falsely and recklessly affirming matters to the Civil Court and the Surrogate's Court, regarding two of his clients, respondent violated DR 7-106(SC) (1)

Charge nine alleged that, by failing to return property to two clients, respondent violated DR 9-102 (B) (4).

Charge ten alleged that, by advocating a position materially adverse to a former client, respondent violated DR 5-108(A) (1), after the 1990 Amendments.

Charge eleven alleged that, by threatening his clients and their new attorneys and by physically and verbally abusing all five clients and by engaging in all of the conduct alleged in the statement of charges, respondent engaged in conduct that reflects adversely on his fitness to practice law in violation of DR 1-102(A) (6) and DR 1-102(A) (7) after the 1990 Amendments.

In his amended answer, respondent denied all eleven charges and raised several affirmative defenses.

A hearing was held on the within charges on April 20, 1991, April 27, 1992 and May 11, 1992. The Hearing Panel thereafter sustained all of the charges of misconduct except as to part of Charge eleven which charges physical abuse. The Panel issued its written report

recommending that respondent be disbarred and stating in pertinent part as follows:

> Respondent has regularly engaged in a pattern of professional misconduct by continuing to hold himself out as his clients' lawyer after he has been discharged by them, threatening them, failing to cooperate with their new attorneys, interfering with their representation by new counsel, revealing clients' confidences or secrets learned in the course of his representation, failing to return their property to them, and most seriously, deliberately or recklessly making false or unsubstantiated prejudicial statements about such clients to government agencies, including the Immigration and Naturalization Service and at least one foreign government, as well as to their new attorneys, their employers, their spouses, courts and others.
>
> Respondent has shown no remorse throughout his extensive testimony, and was not candid with the panel. Most importantly, he did not acknowledge or give any indication that he understood that his conduct violated the Code of Professional Responsibility.

By petition dated June 17, 1992, the DDC seeks an order confirming the Hearing Panel's report and imposing the recommended sanction of disbarment. In opposition, respondent seeks an order disaffirming the findings of the Hearing Panel and either dismissing the charges or directing that a new hearing be held. Counsel also requests that any further proceedings be suspended until respondent is physically capable of assisting in his own defense.

It is contended that the five complaints of professional misconduct were made during a period of time when respondent was

seriously ill. While counsel concedes that respondent's actions concerning one of the charges warranted disciplinary proceedings, he asks that the Court consider respondent's medical condition. He further states that respondent's past practice of more than 25 years demonstrates a behavior pattern which was exemplary up until the time of his illness. Finally, counsel claims that the findings should be disaffirmed because of non-compliance with §605.22(c) in that there was not a proper quorum during the hearings.

In reply, the DDC contends that the complaints against respondent are not a recent occurrence in view of the deliberately or recklessly making false or unsubstantiated prejudicial statements about such clients to government agencies, including the Immigration and Naturalization Service and at least one foreign government, as well as to their new attorneys, their employers, their spouses, courts and others.

Respondent has offered no mitigation for his actions and was not candid with the Panel. His persistent denials of wrongdoing indicate he fails to understand that his conduct violated the Code of Professional Responsibility. Respondent's misconduct spans a period of several years and pre-dates the illness he raises for the first time in response to the Committee's petition to confirm the report. Respondent's diabetic condition has existed for more than 10 years and respondent had ample opportunity to offer this evidence in mitigation during the hearings. No such evidence was presented at the hearing. Respondent offered no evidence in mitigation of the misconduct and, in 1986, was admonished by the Committee on two separate occasions.

We reject respondent's claim that the report should be disaffirmed because of non-compliance with §605.22(c) of the Court's Rules relating to a quorum. No objection was taken. Nor was the issue raised when either of the panel members left the room. The alleged irregularity in procedure does not invalidate the Hearing Panel's findings (22 NYCRR §605.1[b]).

Accordingly, the petition is granted and the Hearing Panel's report confirmed. The respondent is disbarred from the practice of law and his name stricken from the roll of attorneys in the State of New York, effective immediately. Respondent's petition to disaffirm the findings of the Hearing Panel is denied.

All concur.

Order filed.

No.

Supreme Court of the State of New York

APPELLATE DIVISION–FIRST JUDICIAL DEPARTMENT

In the Matter of Omar Z. Ghobashy,
an attorney and counselor-at-law:

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Petitioner,

OMAR Z. GHOBASHY, ESQ.,

Respondent.

HAL R. LIEBERMAN
Chief Counsel
Attorney for Petitioner
DEPARTMENTAL DISCIPLINARY COMMITTEE
41 Madison Avenue
New York, N. Y. 10010
(212) 685-1000
Of Counsel

To: Fredric Lewis, Esq.
7 Dey Street
New York, New York 10007
Attorney(s) for Respondent

Service of a copy of the within
is hereby admitted Dated

Attorney(s) for

Sir: Please take notice that the within is a (certified) true copy of an Order duly entered in the office of the clerk of the within named court on January 14, 1993

Dated, January 15, 1993

Yours, etc.,
HAL R. LIEBERMAN
Chief Counsel
DEPARTMENTAL DISCIPLINARY COMMITTEE
41 Madison Avenue
New York, N.Y. 10010

To Fredric Lewis, Esq.
Attorney(s) for Respondent

Supreme Court of the State of New York

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of Omar Z. Ghobashy, a disbarred attorney:

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Petitioner,

OMAR Z. GHOBASHY,

Respondent.

NOTICE OF ENTRY M-882

SIR:

PLEASE TAKE NOTICE that the within is a certified copy of an order and decision duly made in this proceeding and duly entered and filed in the office of the Clerk of the Supreme Court of the State of New York, Appellate Division, First Department, on the 27th day of April, 1993.

Dated: New York, New York April 28, 1993

Yours etc.,

HAL R. LIEBERMAN
Attorney for Petitioner
Departmental Disciplinary Committee
41 Madison Avenue
New York, N. Y. 10010
(212) 685-1000

MADY J. EDELSTEIN
Of Counsel

To: Fredric Lewis, Esq.
7 Dey Street
New York, New York 10007
Attorney for Respondent

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 27, 1993

Present—Hon. Francis T. Murphy, Presiding Justice
E. Leo Milonas
Ernst H. Rosenberger
Bentley Kassal
Israel Rubin, Justices

In the Matter of Omar Z. Ghobashy, admitted as Omar Zaki Ghobashy, an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner,

Omar Z. Ghobashy,

Respondent

/stamped/
Filed
Apr 27 1993
Appellate Division, Supreme Court
First Department

M-882

The above-named respondent having moved for an order staying execution and enforcement of the order of this Court entered on January 14, 1993 and for leave to appeal to the Court of Appeals from said order,

Now, upon reading and filing all of the papers in support of the motion and those opposed; and due deliberation having been had thereon, it is unanimously

Ordered that said motion be and the same hereby is denied in all respects.

ENTER:

/s/ Francis X. Galdi
Clerk

APPELLATE DIVISION SUPREME COURT FIRST DEPARTMENT STATE OF NEW YORK

I. FRANCIS X. GALDI, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on 4-27-93 and that the same is a correct transcript thereof, and of the whole of said original

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court APRIL 27th, 1993

/s/ Francis X. Galdi
Clerk

APPENDIX D—AFFIDAVITS OF PHYSICIANS

Supreme Court of the State of New York

APPELLATE DIVISION: FIRST DEPARTMENT

In the matter of Omar Z. Ghobashy, an attorney and counsel-at-Law.

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner,

-against-

Omar Z. Ghobashy,

Respondent.

AFFIDAVIT OF PHYSICIAN

STATE OF NEW YORK

ss:

COUNTY OF WESTCHESTER

LEONARD DIRE, M.D. being duly sworn, deposes and says:

That I am a physician duly licensed to practice medicine in the State of New York and I maintain offices in New Rochelle, New York.

That my specialty is cardiology and that I am affiliated with Westchester Medical Center in Valhalla, New York.

Mr. Omar Z. Ghobashy came under my care on June 12, 1992. I directed that he have a cardiac catherization performed. My findings were as follows:

Mr. Ghobashy suffered a myocardial infarction complicated by congestive heart failure. He has a severe ischemic cardiomyopathy.

Mr. Ghobashy's condition precludes any type of operative intervention. His heart must be treated by conservative therapies.

In my opinion, it is necessary for him to restrict his activity. At this time, he must avoid any stress and will be unable to engage in the practice of law for at least five or six months.

I have asked Mr. Ghobashy to avoid all stressful situations, as they would be life threatening in his condition.

/s/ Leonard Dire 7/2/92
LEONARD DIRE, M.D.

Supreme Court of the State of New York

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of Omar Z. Ghobashy, an Attorney and Counsel-at-Law.

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner,

Omar Z. Ghobashy,

Respondent.

AFFIDAVIT OF PHYSICIAN

STATE OF NEW YORK

ss:

COUNTY OF WESTCHESTER

MICHAEL EUFEMIO, M.D. being duly sworn, deposes and says:

That I am a physician duly licensed to practice medicine in the State of New York and I maintain offices in New Rochelle, New York.

That I am a Diplomate of the American Board of Internal Medicine with a subspecialty in endocrinology and metabolism.

That I am the Chief of Endocrinology at the New Rochelle Hospital and I am an attending physician at the Mount Vernon Hospital.

That Mr. Omar Z. Ghobashy first came to see me on January 26, 1990. I was advised that Mr. Ghobashy had been a diabetic for ten years and that his internist had been treating him with micronaise which is an oral medication.

At the time he came to see me his diabetes was controlled with a blood sugar reading of 350. I prescribed insulin for Mr. Ghobashy.

Mr. Ghobashy used insulin and despite the use of insulin and monitoring of his blood sugar his diabetes fluctuated and as late as February, 1992 his blood sugars were as high as 601 and it was necessary for me to have him admitted to New Rochelle Hospital in an attempt to regulate his blood sugars.

Blood sugars in the range from 300 to 600 can be a cause for negative psychological responses that, in turn, can further exacerbate the disease. High blood sugar also produces mood changes and feelings of irritability, anxiety, depression and changes in personality and conduct.

In the diabetic person stress can mean a constant roller coaster effect of hormonal changes that inhibit the action of insulin.

Mr. Ghobashy is currently under active treatment to stabilize his diabetic condition.

/s/ Michael Eufemio
MICHAEL EUFEMIO, M.D.

Sworn to before me this day of July, 1992

Notary Public

In my opinion Mr. Ghobashy's high blood sugars may have contributed to his erratic behavior.[handwritten]
/s/ Michael Eufemio

APPENDIX E—ORDER OF EXTENSION OF TIME BY SUPREME COURT OF THE UNITED STATES

Supreme Court of the United States

OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

September 14, 1993
Mr. Omar Zaki Ghobashy
85 Wildwood Road
New Rochelle, NY 10804

Re: Omar Zaki Ghobashy v. Departmental Disciplinary Committee for the First Judicial Department
Application No. A-244

Dear Mr. Ghobashy:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on September 14, 1993, signed an order extending the time to and including November 8, 1993.

A copy of the Justice's order is enclosed.

Very truly yours,
WILLIAM K. SUTER, Clerk
By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

Supreme Court of the United States

No.

A-244

Omar Zaki Ghobashy,

Petitioner

v.

Departmental Disciplinary Committee for the First Judicial Department

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ORDER

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 8, 1993.

/s/ Clarence Thomas
Associate Justice of the Supreme Court of the United States

Dated this 14th day of September, 1993.

Supreme Court of the United States

OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Omar Zaki Ghobashy
85 Wildwood Road
New Rochelle, NY 10804

Ms. Mady Edelstein
First Department of New York
41 Madison Avenue
New York, NY 10010

Francis X. Galdi
Appellate Division, Supreme Court of New York,
First Judicial Department
27 Madison Avenue
New York, NY 10010

APPENDIX F—AMENDMENTS VIII AND XIV(1) TO UNITED STATES CONSTITUTION

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

Excessive Bail or Fines and Cruel Punishment Prohibited. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV(1) TO THE UNITED STATES CONSTITUTION

Citizenship Rights Not to be Abridged. (1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

FILED
DEC - 7 1993
OFFICE OF THE CLERK

No. 93-726

In The

Supreme Court of the United States

October Term, 1993

OMAR ZAKI GHOBASHY,

Petitioner,

v.

DEPARTMENTAL DISCIPLINARY COMMITTEE,

Respondent.

On Petition for Writ of Certiorari to The New York Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

HAL R. LIEBERMAN
Chief Counsel
Departmental Disciplinary Committee for the First Judicial Department
Attorney for Respondent
41 Madison Avenue
New York, New York 10010
(212)685-1000

MADY J. EDELSTEIN*
of Counsel

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

It is not an error for the New York State Court of Appeals to decide that the order of the Appellate Division, First Department disbarring the applicant and removing his name from list of attorneys admitted to practice law in the State of New York, is not a final order from which an Appeal may [be] heard by the Court of Appeals?

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No. 93-726

In The

Supreme Court of the United States

October Term, 1993

OMAR ZAKI GHOBASHY,

Petitioner,

v.

DEPARTMENTAL DISCIPLINARY COMMITTEE,

Respondent.

On Petition for Writ of Certiorari to
The New York Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

On January 14, 1993, the Appellate Division for the First Judicial Department of New York State issued a unanimous decision disbarring Petitioner, Omar Z. Ghobashy ("Petitioner"). The Court's decision confirmed the Report of a disciplinary Hearing Panel which, after several days of hearings, unanimously sustained eleven charges of serious professional misconduct and recommended disbarment. In upholding the Hearing Panel Report, the Court found that Petitioner wrongfully revealed client confidences and secrets; intentionally prejudiced or damaged clients; made false and misleading

threats to clients; failed to withdraw from representation after being discharged; falsely and recklessly affirmed matters to the courts; neglected client matters; failed to cooperate with successor counsel; and, engaged in an impermissible conflict of interest by taking a position in a litigated matter that was adverse to his former client.

In disbarring Petitioner, the Appellate Division noted that Petitioner's " . . . persistent denials of wrongdoing indicate that he fails to understand that his conduct violated the Code of Professional Responsibility." (Petitioner's Appendix A at A28) The Appellate Division also found that Petitioner offered no mitigation and was not candid with the Hearing Panel.

The disciplinary hearing took place over the course of three days. Six witnesses appeared for the Committee; six witnesses, including Petitioner who testified on his own behalf, appeared for Petitioner. Petitioner was represented by counsel throughout the hearing. Both Petitioner and the Committee placed documents in evidence. The Panel cited Petitioner's pattern of professional misconduct by making deliberately or recklessly false or unsubstantiated prejudicial statements about his clients to the U.S. Immigration and Naturalization Service ("INS"); to a foreign government; to their employers; and to their new attorneys, their spouses and others.[1] The Panel concluded

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[1] Attached to the Hearing Panel Report are several letters written by Petitioner. These letters include Petitioner's letters to his clients threatening them with criminal prosecution, falsely asserting that they cannot discharge him as their attorney, and accusing their new lawyers of acting illegally and incompetently. Other attachments are Petitioner's letter to INS request-

that Petitioner " . . . showed no awareness of the most basic norms of professional conduct . . . " and that "Petitioner is a danger to the public; he is a potential source of harm to persons who retain him."

Petitioner has been denied permission to appeal the disbarment order to the Court of Appeals of New York State twice. On April 27, 1993 the Appellate Division denied Petitioner's first application for a stay and for leave to appeal. On July 9, 1993, the New York Court of Appeals denied Petitioner's second motion for a stay and for leave to appeal.

In presenting the question for review by this Court, Petitioner claims that the Court of Appeals erred in denying his motion for a stay and for leave to appeal by holding that the Appellate Division's order of disbarment was not final and therefore not appealable. This claim mischaracterizes the Court of Appeals' decision. In fact, the Court of Appeals denied Petitioner's motion in its entirety and on the merits; and there is no basis for this Court to grant certiorari on this point.

Petitioner's also claims that the Appellate Division denied him due process. This claim is also groundless and in large measure has already been subject to State court review. Petitioner seeks a remedy from this Court, namely a reduction in the sanction imposed, which is solely within the province of the Appellate Division.

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ing that deportation proceedings be commenced against his clients and Petitioner's letter to a foreign embassy accusing a client of bigamy and draft evasion, and presenting forged documents, and requesting that his client's passport be forfeited.

There are no special or important reasons for granting review of this matter, as required by Rule 10 of the Rules of this Court. As no substantial constitutional question is presented, the writ should be denied.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals properly denied Petitioner's motion on the merits and properly declined to review the Appellate Division's April 27, 1993 decision.

The Court of Appeals denied Petitioner's motion for a stay and leave to appeal the disbarment order in its entirety. The Court of Appeals also determined that the Appellate Division's April 27, 1993 decision was not final and therefore not appealable. Indeed, the decision specifically states that Petitioner's motion " . . . *insofar as it seeks leave to appeal from the April 27, 1993 Appellate Division order*, be and the same is hereby dismissed upon the ground that that order does not finally determine the proceeding within the meaning of the [New York State] Constitution . . . " [emphasis added] As shown below, the Court of Appeals' decision to deny permission to appeal was within its discretion and proper in all respects.

Under the New York statutory scheme, the Appellate Division is granted exclusive power to remove from office any attorney who is guilty of professional misconduct.[2] It has long been held that the power and discretion of the Appellate Division in deciding sanction when guilt

[2] Judiciary Law §90(2) is contained in Appendix A.

is established is not subject to review by the Court of Appeals. *In re Axtell*, 257 N.Y. 210 (1931); *In re Goodman*, 199 N.Y. 143 (1910). Permission to appeal to the Court of Appeals, as opposed to an appeal as of right, is discretionary and may be granted by either the Appellate Division or the Court of Appeals.[3]

Petitioner argues that the Court of Appeals erred by holding that the Appellate Division's ruling was not final. But, pursuant to New York Civil Practice Law and Rules, an Appellate Division order is final only if it disposes of all the issues in an action. A subsequent appeal may be taken only from this final order, and not from any additional orders entered pursuant to it.[4] Thus, the Appellate Division's disbarment order was potentially appealable by permission, but not its April 1993 order denying leave to appeal to the Court of Appeals. This is precisely what the Court of Appeals ruled in its July 9, 1993 decision.

The result here is far from unique: Appellate Division orders denying leave to appeal to the Court of Appeals are consistently denied by the Court of Appeals on the ground that such orders do not finally determine the action within the meaning of the New York State Constitution.[5] *See*, for example, *Cora v. Branciforte*, 78 N.Y.2d 940 (1991); *Matter of Knobel*, 5 N.Y.2d 944 (1959).

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[3] C.P.L.R. §5601 and §5602 (Appendix B)

[4] C.P.L.R. §5611 (Appendix C)

[5] New York Constitution, Article 6 §3 (Appendix D)

B. Petitioner's due process claims present no basis for review by this Court.

Petitioner was served with a detailed Statement of Charges well in advance of the hearing, setting forth the factual basis for the allegations of misconduct and stating which disciplinary rules were violated. A copy of the First Amended Statement of Charges is contained in Appendix E. Petitioner submitted an answer denying these charges, and raising certain defenses. A full evidentiary hearing was held in three sessions attended by Petitioner and his counsel. Petitioner was represented by counsel at the investigatory stage, throughout the hearing, and in each of his applications for review by the Appellate Division and the Court of Appeals.

Petitioner complains that he was not permitted to confront his accusers and that certain witnesses were prevented from appearing. On the contrary, Petitioner cross examined each of the Committee's witnesses and no witnesses were prevented from appearing. Moreover, in addition to the witnesses who appeared voluntarily on Petitioner's behalf, Petitioner had the right to ask the Court to issue a subpoena for others. Indeed, he exercised that right by compelling the appearance of the wife of one of the complainants (who testified and produced documents as requested by Petitioner) and by subpoenaing documents from a witness called by the Committee.

Petitioner repeats certain arguments regarding the procedures of the Hearing Panel which were made in the course of his motion to disaffirm the Hearing Panel Report, and subsequent motions. He also raises certain issues here for the first time. However, Petitioner had

notice of the charges against him and a full opportunity to be heard as required by due process. *Matter of Ruffalo*, 390 U.S. 544 (1967). As shown below, Petitioner's claims are baseless and do not merit review by this Court.

1. Petitioner's quorum argument does not invalidate Petitioner's disbarment or merit review by this Court.

Petitioner repeats the argument that there was no quorum at the disciplinary hearing. The applicable quorum rule is set forth in 22 N.Y.C.R.R. §605.22(c).[6] Under it a determination of a Hearing Panel must be by a vote of not less than three Panel members, of whom at least two shall have heard the entire proceeding, and the other shall have either heard the proceeding or read the transcript of that portion not heard. Petitioner opines that the

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[6] The rules governing disciplinary procedures of the Supreme Court Appellate Division, First Judicial Department are codified at 22 N.Y.C.R.R. §§603.1 *et seq.* and 605.1 *et seq.* Section 605.22(c), contained in Appendix F, reads in pertinent part:

> **(c) Quorum and Manner of Acting.** All matters presented to a hearing panel shall be determined by three members of the panel. Two panel members assigned to a matter shall constitute a quorum for the transaction of business. All action shall require the concurrence of at least two members. At least two members of a hearing panel assigned to a matter shall have heard the entire proceeding. The third assigned member either shall have heard the entire proceeding before the hearing panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard. . . .

quorum rule was violated because Panel members *may* have failed to read the hearing transcript. He further argues that one Panel member who was required to be present did not attend part of one of the hearing sessions. Petitioner's arguments were rejected by both courts below, and raise no issue to be reviewed by this Court.

As stated by the Appellate Division in its disbarment order, even if the quorum rule was violated, it constituted a nonprejudicial irregularity which did not affect substantial rights. *See*, 22 N.Y.C.R.R. §605.1(b).[7] As the record states, at least two Panel members were present at each hearing session, and there is no evidence that any Panel member failed to read any part of the transcript. The portion of the hearing for which one member (who Petitioner argues was required to attend) was absent constituted 23 pages of a 506 page hearing transcript; only one of the eleven sustained charges (Charge Ten) is based upon this portion of the hearing.

Petitioner's analogy to criminal procedure and grand jury quorum rules was made to the Appellate Division

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[7] 22 N.Y.C.R.R. §605.1(b) provides:

(b) These Rules are promulgated for the purpose of assisting the Office of Chief Counsel, the Respondent and the Committee to develop the facts relating to, and to reach a just and proper determination of, matters brought to the attention of the Office of Chief Counsel or the Committee. The Committee will not hold action of a Hearing Panel invalid by reason of any nonprejudicial irregularity. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

and Court of Appeals. Both Courts rejected this argument, as well they should have. A Hearing Panel is not a grand jury. Disciplinary proceedings are not criminal proceedings. *Ex parte Young*, 284 A.D. 499, 500 (1st Dep't 1954); *Kelly v. Greason*, 23 N.Y.2d 368, 383-384 (1968). And, in any event, due process does not require the mechanical application of such quorum rules in an administrative hearing. *See Matter of Freymann v. Board of Regents of the State of New York*, 102 A.D.2d 912 (3rd Dep't 1984), *app. dism.* 64 N.Y.2d 645 (1984).

Petitioner's separate claims that trial counsel was ineffective because he failed to raise the quorum question were likewise rejected by the Appellate Division and the Court of Appeals. Counsel's "failure" to object to a purported lack of quorum is of no moment in light of the Appellate Division's ruling that even if there was a quorum rule violation, it was inconsequential. Trial counsel represented Petitioner competently in all respects: he cross-examined witnesses, he examined witnesses called on Petitioner's behalf, he examined Petitioner, he presented legal arguments, he submitted responsive pleadings and he introduced documentary evidence on Petitioner's behalf at the hearing. Trial counsel's representation clearly met the "reasonable" standard established in *U.S. v. Strickland*, 466 U.S. 668, 686 (1984).

2. Petitioner's failure to submit evidence of his alleged medical disability did not deprive him of due process.

The Appellate Division's order of disbarment ruled on Petitioner's claims regarding his medical condition.

Noting that Petitioner did not offer medical evidence at his disciplinary hearing, despite notice by Committee staff that such evidence could be relevant, the Appellate Division found that Petitioner did not establish that his physical ailments existed at the time of his misconduct or were related to his actions. Petitioner submits to this Court the same (unsworn) affidavits regarding his medical treatment that were submitted in Petitioner's unsuccessful motions to the Appellate Division.

Petitioner's argument that his counsel failed to offer medical evidence in mitigation and that he was therefore deprived of a fair hearing was rejected by the Appellate Division; there is no evidence that Petitioner wished to argue for a suspension based upon a physical disability, despite notice from Committee staff. Petitioner did not present evidence of any disability or to show that any disability was causally linked to his professional misconduct as required by New York law. *See*, for example, *Matter of Levine*, 101 A.D.2d 49 (1st Dep't 1984) Petitioner elected to contest the disciplinary charges on the merits and did not prevail.

3. Justice Murphy's participation in the proceedings below was entirely proper.

Petitioner objects here for the first time to Presiding Justice Murphy's participation in the Appellate Division decisions below. He suggests that Justice Murphy is biased because of his role in appointing disciplinary hearing panels. There is no basis whatsoever for these arguments. Moreover, Justice Murphy does not personally appoint the members of the Committee; the Appellate

Division as a Court does so.[8] Petitioner offers no statutory or case law to support his argument, nor does he attempt to support the insinuation that Justice Murphy did not act impartially in this case. It should be noted that Justice Murphy was joined in the Appellate Division's unanimous decision to disbar and later to deny Petitioner's motion for leave to appeal by four Justices of the Appellate Division. In addition, the Court of Appeals decision denying further review was made by Chief Judge Judith S. Kaye. It may be noted that the Appellate Division does not uniformly confirm Hearing Panel Reports either with regard to findings of fact or sanctions to be imposed.[9]

4. The Hearing Panel was properly constituted.

Petitioner also asks this Court to review his case because, he claims, the Hearing Panel was not properly constituted due to the residence of the Panel Chair. Not only was this issue never raised throughout the proceedings below, it is entirely frivolous. The Court Rules setting forth the procedures of the Departmental Disciplinary Committee expressly state that at least two-thirds of the Committee shall be members of the bar of the State of New York in good standing, each of whom shall reside *or have a principal place of business in the City of New York.*[10] [emphasis added] The Panel Chair, Sheldon

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[8] 22 N.Y.C.R.R. §603.4(a) (1) (Appendix G)

[9] *See,* for example, *Matter of Chervin,* 181 A.D.2d 111 (1st Dep't 1992); *Matter of Glotzer,* 191 A.D.2d 112 (1st Dep't 1993); *Matter of Strier,* 190 A.D.2d 140 (1st Dep't 1993).

[10] 22 N.Y.C.R.R. §603.4(a) (2) (Appendix H)

H. Elsen, is a partner in the law firm of Orans, Elsen and Lupert in New York City. Thus the Panel's composition fully satisfies the Appellate Division's rules.

CONCLUSION

Petitioner had a full and fair hearing in this matter that comported with due process. He was served with detailed charges setting forth specific conduct which violated specific disciplinary rules of the Lawyer's Code of Professional Responsibility. He had ample opportunity to call witnesses on his own behalf, to cross-examine adverse witnesses, to testify in his own behalf, to offer mitigation evidence, and to argue his defenses, as reflected in the lengthy Hearing Panel Report. Petitioner was represented by counsel at the investigatory stage, at the hearing, and on each post-hearing motion. He was found to have violated the fundamental duty of loyalty to the client. He had his day in court and has been disbarred to protect the public, which is the primary concern of disciplinary matters. *Matter of Mitchell*, 40 N.Y.2d 153, 156 (1976). The New York Courts have reviewed Petitioner's claims thoroughly and properly and rejected them in the State's recognized role of regulating the State bar. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

As to the question presented, the Court of Appeals properly denied Petitioner's motion for leave to appeal and properly refused to review the April 27, 1993 Appellate Division decision. No substantial constitutional issue

has been raised, and the writ should be denied in all respects.

Dated: New York, New York
December 2, 1993

Respectfully submitted,
HAL R. LIEBERMAN
Chief Counsel
Departmental Disciplinary
Committee for the First
Judicial Department
Attorney for Respondent
41 Madison Avenue
New York, New York 10010
(212) 685-1000

MADY J. EDELSTEIN*
Of Counsel
*Counsel of Record

APPENDIX A

JUDICIARY LAW § 90(2)

§ 90. Admission to and removal from practice by appellate division; character committees

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

APPENDIX B

New York Civil Practice Law and Rules

ARTICLE 56
APPEALS TO THE COURT OF APPEALS

§ 5601. Appeals to the court of appeals as of right.

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an

administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements or subdivision (a) or of paragraph one of subdivision (b) except that of finality.

§ 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by the appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court, final determination of such agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award and the final judgment, determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order

described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX C

New York Civil Practice Law and Rules

§ 5611. When appellate division order deemed final.

If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. If the aggrieved party is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his having performed it.

APPENDIX D

Art. 6, § 3 CONSTITUTION

§ 3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

APPENDIX E

BEFORE THE DEPARTMENTAL DISCIPLINARY COMMITTEE OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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In the Matter of

Omar Z. Ghobashy, Esq.

Respondent.

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FIRST AMENDED STATEMENT OF CHARGES

Preliminary Statement

1. The Departmental Disciplinary Committee for the First Judicial Department ("the Committee") brings this proceeding pursuant to 22 N.Y.C.R.R. §605.12 to discipline Omar Z. Ghobashy ("Ghobashy") for violating Disciplinary Rules 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), 2-110(A)(2) and (B)(4), 4-101(B)(1) and (2), 6-101(A)(3), 7-101(A)(2) and (3), 7-104(A)(1), 7-106(C)(1) and 9-102(B)(4) of the Lawyer's Code of Professional Responsibility before the 1990 Amendments (the "Code") and DR 5-108(A)(1) of the Code after the 1990 Amendments. As more fully set forth below, respondent is guilty of unethical practices and professional misconduct because, inter alia, he threatened his clients and made false and reckless statements to them, he wrongfully revealed confidences or secrets of his clients to their disadvantage, he intentionally prejudiced or damaged clients during the course of representing them, he failed to withdraw from representation after being discharged by his clients, and he failed to return property to his clients.

2. Respondent was admitted to practice as an attorney and counselor-at-law by the Appellate Division of the Supreme Court, Second Judicial Department, in June 1962.

3. Respondent has maintained an office for the practice of law within the First Judicial Department at all times relevant to these charges.

Background Facts

4. As set forth more specifically below, respondent was retained by the five clients named herein, was discharged by them, continued to hold himself out as their lawyer after being discharged, threatened them, failed to cooperate with their new attorneys, interfered with their representation by new counsel, revealed their confidences and secrets, failed to return their property to them, and made false or reckless and prejudicial statements about them and their new attorneys to the INS, to their employers, to their spouses, to the court and to others.

A) Kirsten and Jorge Gallardo

5. In or around August 1987, Kirsten and Jorge Gallardo (the "Gallardos") retained respondent in order to obtain a visa for Jorge Gallardo based upon their marriage. The Gallardos had begun the process by filing an application with the Immigration and Naturalization Service ("INS") pro se. Their application had been denied after they were interviewed about their marriage. The Gallardos had filed an appeal.

6. According to the retainer agreement, the Gallardos were to pay respondent $500.00 in advance and $450.00 when they received an appointment for their interview at the INS, plus filing fees. The Gallardos paid respondent $500.00 upon signing the retainer agreement.

7. Respondent filed a Notice of Entry of Appearance as attorney for the Gallardos with the INS on or about August 3, 1987, after meeting with the Gallardos and taking original personal financial records from them. On August 7, 1987, respondent submitted an affirmation in support of the Gallardos's appeal to the Board of Immigration Appeals in Falls River, Virginia.

8. In or around November 1987, Mrs. Gallardo received a letter from the INS offering the Gallardos a second interview concerning the legitimacy of their marriage. Mrs. Gallardo conveyed this information to respondent and asked respondent to withdraw the appeal and proceed with a second interview. Respondent refused this request and continued with the appeal. As a consequence, as set forth below, the Gallardo's application was not granted until two years later when new counsel advised them to undergo a second interview.

9. Beginning in or about November 1987 and continuing through July 1989, the Gallardos attempted to contact respondent to discuss the progress of their case. Respondent failed to respond to the Gallardos as to the status of their case.

10. The Gallardos made an appointment to meet respondent on or about July 14, 1989 at his office. On that day, Mrs. Gallardo called respondent's office to confirm the appointment. Mrs. Gallardo heard respondent in the

background yelling that he would not see the Gallardos and was informed by respondent's secretary, Kohanya Ranch, that respondent refused to see the Gallardos and that he would call the police if they came to his office.

11. On July 17, 1989, the Gallardos wrote to respondent discharging him and informing him of their new attorney's name and address. They also requested that all of their papers be forwarded to their new attorney. Respondent did not forward the Gallardos' papers or file information despite the Gallardos' request and has not done so to date.

12. Thereafter, on or about August 29, 1989, respondent wrote to the Gallardos stating, inter alia, that their new attorney is incompetent and may damage their case, threatened to sue them for his fee, and predicted that they would fail an interview at the INS.

13. On or about September 13, 1989 respondent wrote to the Gallardos advising them that their new attorney's actions in withdrawal of their appeal might subject them to criminal proceedings and subject Mr. Gallardo to deportation. In this letter respondent also expressed his "horror" at the tactics of his successor attorneys.

14. On or about the same day, September 13, 1989, respondent wrote to Scott Blackman, Acting District Director of the INS, regarding the Gallardos's case. In this letter respondent falsely stated that the Gallardos went to another attorney and were evading the marriage fraud act by withdrawing their appeal. In fact, the Gallardos's application was approved by the INS in November 1989.

B) Samy A. and Giovanna Hassan

15. Samy A. Hassan ("Mr. Hassan") retained respondent in 1984 while he was in this country as a visitor. On January 20, 1987 Mr. Hassan married Giovanna Hassan ("Mrs. Hassan"), who was a permanent U.S. resident. In or about March 1988 the Hassans retained respondent to apply for a visa for Mr. Hassan based upon the marriage.

16. On or about April 4, 1988, respondent filed the required petition with the INS and a received notice of approval which advised respondent that the Hassans' petition had been forwarded to the United States Consulate in Lima, Peru and that respondent would be contacted when Mr. Hassan's turn was reached on the waiting list for an interview.

17. Thereafter, on or about April 30, 1988, respondent advised Mr. Hassan that his petition had been approved and that it had been sent to Lima, Peru.

18. On or about September 15, 1989, respondent and Mr. Hassan were advised that the American consulate in Peru had not received Mr. Hassan's petition. Upon learning this, Mr. Hassan met with respondent in his office and asked for an explanation. During the course of this meeting, respondent cursed Mr. Hassan, physically shoved Mr. Hassan out of his office, questioned the validity of his marriage to Mrs. Hassan and stated that the INS would not approve the petition. Respondent also threatened to call the INS and report that the Hassans' marriage was fraudulent.

19. The Hassans retained new counsel, Marjorie A. Lesch, Esq. ("Lesch"). On or about September 15, 1989 Lesch wrote to respondent advising him that she had been retained by the Hassans in connection with Mr. Hassan's application for permanent residency and requested that respondent forward the Hassan file to her office. The letter was countersigned by Mr. and Mrs. Hassan.

20. Following receipt of Lesch's letter, on September 27, 1989 respondent wrote directly to Mrs. Hassan, addressing her by her maiden name. In the letter, respondent stated that his obligation to her was "more" than his obligation to her husband, made reference to the INS warning of criminal prosecution when family relationships are falsified to obtain visas, and wrote that the behavior of her husband is " . . . unexplained. He flatly stated that he does what he pleases and goes with any woman he likes."

21. On or about October 7, 1989, respondent wrote to Lesch enclosing a copy of his September 27, 1989 letter to Mrs. Hassan. In his letter, respondent told Lesch that if she would send him certain INS documentation he would have the petition approved, whereupon Lesch could file the required forms in Lima, Peru. Later in the letter respondent questioned the genuineness of Mr. Hassan's signature on her letter of September 15, 1989, questioned Lesch about her connection with Mrs. Hassan and asked whether Lesch knew the name, address and employment of a woman Mr. Hassan brought to respondent's office. Respondent then stated "I think a prompt answer is for your own protection. . . . " Finally, respondent asked

Lesch to remit the balance of his fee to insure the release of the Hassans' papers to her.

22. Lesch answered respondent's letter on October 17, 1989, reiterating that the Hassans wanted her to represent them, and again asking that respondent forward the Hassans' documents and INS correspondence to her. Respondent did not forward any documents or file information to Lesch pursuant to her demand and has not done so to date.

23. On or about October 10, 1989, respondent wrote and delivered, or caused to be delivered, a note addressed to "Mr. Sherif Omar, the Ambassador and Egypt's Consulate General in New York." In a memorandum which accompanied the note, respondent asked that the Consulate refuse Mr. Hassan a new passport or withdraw any passport that had been issued to Mr. Hassan and recommended that Mr. Hassan be issued travel documents to Egypt only because he is avoiding conscription in Egypt. The note further alleged that Mr. Hassan had committed a fraud at the INS and was currently under investigation. Additionally, respondent expressed his opinion that the Hassans' marriage was a sham marriage, that Mr. Hassan probably committed forgery when he applied for a passport for Peru and that Mr. Hassan visited respondent at his office in the company of a woman who was not his wife and falsely claimed that she was his wife's friend. Respondent closed with a request that the Consulate obtain copies of Mr. Hassan's application to the American Consulate in Cairo because Mr. Hassan might have a wife in Egypt.

24. Mr. Hassan complained to the Committee about respondent in September 1989. On or about October 23, 1989, respondent wrote to Lesch stating, among other things, that Lesch will be held liable for Mr. Hassan's "false complaint" if respondent finds out that Lesch had anything to do with it and that respondent will lodge a complaint against Lesch.

25. Mr. Hassan was granted permanent residency in November 1990 after an extensive investigation by the INS.

C) Mamdouh M. ElDeeb

26. In or about December 1989, Mamdouh M. ElDeeb ("Mr. ElDeeb") and Bronx Lebanon Hospital Center ("Hospital") retained respondent to represent Mr. ElDeeb before the INS. The purpose of respondent's representation was to obtain permanent residency status for Mr. ElDeeb on the basis of his employment at the Hospital.

27. Mr. ElDeeb signed a retainer agreement with respondent which called for payment of $750.00 in advance, $500.00 upon approval of the application and $500.00 upon the INS interview for adjustment, plus filing fees. Mr. ElDeeb paid respondent $800.00 upon signing the retainer.

28. At the time Mr. ElDeeb retained respondent, Mr. ElDeeb had already obtained permission for a temporary stay in the U.S. At respondent's request, Mr. ElDeeb prepared his own application to extend the period of his temporary stay. Respondent instructed Mr. ElDeeb to file

an application for an extension of his stay at the INS headquarters in New York City.

29. On or about May 18, 1990 Marilyn Rosenthal, Esq. ("Rosenthal") wrote to respondent to inform him that Mr. ElDeeb had decided to discharge respondent and that she had been retained to represent Mr. ElDeeb. Rosenthal asked respondent to forward Mr. ElDeeb's file to her and enclosed a signed authorization from Mr. ElDeeb.

30. Upon receipt of the above letter, respondent wrote to Rosenthal on May 20, 1990 stating that when he received his fee of $1,085.00 he would forward Mr. ElDeeb's file. Respondent further stated that if payment was not received he would sue Mr. ElDeeb and notify the Hospital. Respondent did not forward Mr. ElDeeb's file or file information to Rosenthal and has not done so to date.

31. On or about May 23, 1990, Mr. ElDeeb wrote to respondent, expressed his dissatisfaction with respondent's representation and respondent's ethics, and asked for the return of his money and his file, and advised him that he would complain to the Committee.

32. In complete disregard of Mr. ElDeeb's and Rosenthal's letters, on or about May 26, 1990 respondent filed Mr. ElDeeb's petition for labor certification with the INS.

33. Thereafter, on or about May 31, 1990, respondent wrote a letter to Denise Corvino, Employment Specialist at the Hospital, telling her that Mr. ElDeeb owed his money for legal services. Respondent's letter also stated that Mr. ElDeeb might be subject to deportation for overstaying his visa and for unauthorized employment

and that Mr. ElDeeb had failed to file his authorization papers in New Jersey, the proper office. He further indicated that because Mr. ElDeeb had not followed respondent's advice he would not be eligible to adjust his status and would have to go to Egypt. Finally, he stated that he might sue Mr. ElDeeb for libel and slander and that the Hospital would be liable since Mr. ElDeeb used the Hospital's stationary in correspondence with respondent.

34. Mr. ElDeeb complained to the Committee about respondent in June 1990.

35. In or about September 1990 respondent commenced a civil suit against Mr. ElDeeb in Bronx County Civil Court for legal fees in the amount of $1,085.00 plus counsel fees. Rosenthal appeared for Mr. ElDeeb and counterclaimed for the return of $562.50 plus counsel fees.

36. Two months later, on or about November 9, 1990, respondent moved for summary judgment and for sanctions against Mr. ElDeeb and Rosenthal on the grounds that the defense and counterclaim were frivolous. In an affirmation that respondent filed in support of his motion, he falsely claimed, among other things, that Mr. ElDeeb had filed a complaint with this Committee that Mr. ElDeeb realized was frivolous, that Mr. ElDeeb failed to submit to conciliation in connection with his complaint to the Committee, and that Mr. ElDeeb had abandoned his complaint. He further affirmed that the attorney who "fraudulently" took over Mr. ElDeeb's immigration case (Rosenthal) "fraudulently" urged Mr. ElDeeb to file his complaint against respondent, that she

had advised Mr. ElDeeb not to proceed with mediation and that she had abused the disciplinary process.

37. Mr. ElDeeb opposed respondent's motion and asked for sanctions against him for his erroneous representations to the Court.

38. On March 25, 1991 Judge Lorraine Backal denied respondent's motion for summary judgment and reserved decision on the issue of sanctions. After a hearing on September 27, 1991 Civil Court Arbitrator Irwin M. Echtman decided the matter in favor of Mr. ElDeeb on the grounds that respondent had no cause of action, but imposed no sanctions on either attorney.

D) Sydney Lanier Fortner and Samir Kahwaji

39. On or about August 6, 1982 Samir Kahwaji ("Mr. Kahwaji") retained respondent in order to obtain permanent residency for Mr. Kahwaji on the basis of political asylum. At respondent's suggestion and insistence, Mr. Kahwaji falsely stated that he was a member of the Moslem Brotherhood in his petition for political asylum. Thereafter, in or about April 1985, following Mr. Kahwaji's marriage to Sydney Lanier Fortner ("Ms. Fortner"), Ms. Fortner and Mr. Kahwaji retained respondent to file a petition for a visa for Mr. Kahwaji based upon their marriage. On or about May 10, 1985 respondent prepared but did not properly file a marriage petition and submitted a notice of appearance as attorney for both Ms. Fortner and Mr. Kahwaji with the INS.

40. During the same month, May 1985, Ms. Fortner and Mr. Kahwaji met with respondent and, at his request,

gave him original documents, including birth certificates and their marriage license.

41. From time to time following their meeting with respondent Ms. Fortner and Mr. Kahwaji requested status reports as to their petition. Respondent failed to respond to their requests except to say that the marriage petition had been filed.

42. Approximately two years after their initial meetings with respondent, in March 1987, Ms. Fortner and Mr. Kahwaji met with respondent in his office. During this meeting respondent refused to answer Ms. Fortner's questions, spoke exclusively to Mr. Kahwaji in Arabic (which language Ms. Fortner does not speak), advised Mr. Kahwaji that Ms. Fortner was trying to ruin Mr. Kahwaji's life, refused to return their original documents or give them copies of papers respondent filed with the INS (after being requested to do so), falsely advised them that the marriage petition had been denied because Ms. Fortner was using her maiden name, stated that Ms. Fortner would be prosecuted for having a fraudulent marriage, ordered them out of his office and threatened to call the police. He also advised them that he had applied to the INS for Mr. Kahwaji under the legalization program.

43. In the wake of this meeting, on April 8, 1987 Ms. Fortner and Mr. Kahwaji wrote to respondent advising him that he was discharged as their attorney and asking him to return their original documents immediately. To date, respondent has not returned Ms. Fortner's and Mr. Kahwaji's original documents.

44. On April 20, 1987 Ms. Fortner wrote to respondent again, notifying him that he was to cease and desist from any further action on their behalf. She further advised him of the name and address of their new attorney, Michael Feiner, Esq. ("Feiner"), and requested that respondent forward all papers to Feiner.

45. Respondent wrote to Mr. Kahwaji on April 20, 1987 and advised him that he would be deported, that his application on the basis of the marriage would be denied, that he had asked Mr. Kahwaji to keep his wife out of the case, and that if Mr. Kahwaji did not appear at respondent's office without his wife he would be arrested and deported. Respondent also falsely advised Mr. Kahwaji that he would forfeit his opportunity to apply under the legalization program unless he complied with respondent's demands and advised Mr. Kahwaji that he would have to sign a new retainer.

46. Notwithstanding the foregoing events and his clients' express dismissal of him as their attorney, on May 18, 1987 respondent wrote to Mr. Kahwaji advising that his case had been scheduled under the legalization program and that Mr. Kahwaji had failed to appear. In the same letter respondent asked Mr. Kahwaji to gather certain documents and advised him that he would reschedule Mr. Kahwaji's case. He also claimed that Mr. Kahwaji's new lawyers "agree" with him on this matter.

47. Disregarding Mr. Kahwaji's instructions, respondent continued to hold himself out as Mr. Kahwaji's attorney. Thus, on or about April 13, 1987 and June 12, 1987, respondent submitted letters to the INS purporting to be on Mr. Kahwaji's behalf. In his June 12, 1987 letter,

respondent advised the INS that it is necessary to reschedule Mr. Kahwaji's deportation hearing. Again, on December 4, 1987, respondent caused a letter to be sent to the Director of the Legalization Office of the INS regarding Mr. Kahwaji. In this letter, respondent advised the Director that another representative of Mr. Kahwaji had applied for legalization, that the reason for the application was that respondent had confronted Mr. Kahwaji and Ms. Fortner as to the validity of their marriage, that Mr. Kahwaji had a prior arrest in Maryland and that Kahwaji had stated in his petition for political asylum that he was a member of Muslim Brotherhood, which respondent characterized as a subversive and terrorist organization close to Islamic fundamentalists in Iran.

F) Nawal Al Omari

48. Nawal Al Omari ("Mrs. Al Omari") retained respondent in or about June 1988 to represent her as administratrix of her husband's estate. Respondent prepared a petition to the Surrogate's Court to have Mrs. Al Omari appointed administratrix which was granted in January 1989.

49. In September 1990, Mrs. Al Omari notified respondent that she wished to discharge him. Her new counsel, Ivan L. Van Leer ("Van Leer"), forwarded duly executed consent forms to that effect to respondent and requested that respondent forward all pertinent papers to him.

50. Respondent subsequently wrote a reply to Van Leer refusing to be substituted, accusing Mrs. Al Omari's relatives of a conspiracy to have him substituted and demanding to know who paid Van Leer's fee.

51. In October 1990 respondent prepared and served a "notice of attorney's lien" on Mrs. Al Omari and her tenant, Faris and Naples Grocery, 456 South Broadway, Yonkers, New York, demanding that all rents be paid to respondent as attorney for Mrs. Al Omari. The notice also stated that his "fee by Surrogate Court is $9,500.00."

52. Contrary to the terms of the notice of attorney's lien, Mrs. Al Omari never authorized respondent to claim a lien for his fee, nor was respondent's fee approved by the Surrogate's Court. Respondent rendered no legal services to Mrs. Al Omari regarding her right to receive rent from her tenant.

53. Even though Mrs. Al Omari had retained new counsel, respondent wrote directly to her in November 1990, again refusing to be substituted, demanding his fee, threatening to execute on her house, stating that she may be subject to criminal investigation, predicting that the INS would contact her, advising her that she will lose her citizenship because her second husband is a bigamist, accusing her of trying to shield criminals and asking her to call him.

54. In January 1991 Van Leer made a motion in Surrogate's Court to be substituted for respondent as Mrs. Al Omari's counsel. Respondent opposed Van Leer's motion and affirmed to the Surrogate's Court that Van

Leer intends to destroy Mrs. Al Omari's "solid case" and obstruct justice, among other things.

55. Without Mrs. Al Omari's consent, respondent then moved in April 1991 to have the Public Administrator, with himself as its counsel, assume the administration of the estate and to remove Mrs. Al Omari as administratrix. In his affirmation in support of the motion respondent stated that Mrs. Al Omari had failed to carry out her duties as administratrix and that she had failed to pay respondent his fees.

56. Surrogate Albert J. Emanuelli denied respondent's motion on April 25, 1991 stating, inter alia, that by pursuing an application to remove Mrs. Al Omari as administrratrix while resisting the efforts of other counsel to replace him as Mrs. Al Omari's counsel, respondent had engaged in an obvious conflict of interest. Respondent is appealing this decision.

57. On May 23, 1991, Surrogate Emanuelli granted Van Leer's motion to be substituted as Mrs. Al Omari's attorney.

CHARGE ONE

58. By making false and misleading statements to his clients and to third parties about his clients, as alleged in paragraphs 12, 13, 14, 18, 23, 33, 41, 42, 45, 46, 47, 51, 52, 53, respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-101(A)(4) of the Code.

CHARGE TWO

59. By making false and misleading statements and about his clients to third parties, as alleged in paragraphs 14, 23, 33, 47 and 63, respondent intentionally and recklessly prejudiced or damaged his clients during the course of a professional relationship in violation of DR 7-101(A)(3) of the Code.

CHARGE THREE

60. By knowingly revealing his clients' confidences or secrets to other clients or third parties to his clients' disadvantage, as alleged in paragraphs 14, 23, 33 and 47, respondent violated DR 4-101(B)(1) and (2) of the Code.

CHARGE FOUR

61. By refusing or failing to file, pursue and complete petitions and applications for his clients and by failing to communicate with his clients as alleged in paragraphs 5 through 10, 26, 27, 28, 32, 39, 41 and 42, respondent neglected matters entrusted to his care in violation of DR 6-101(A)(3) of the Code.

CHARGE FIVE

62. By improperly refusing to withdraw after being discharged, as set forth in paragraphs 11, 12, 13, 19, 20, 21, 22, 29, 30, 31, 32, 43, 50, 53, 54 and 56, respondent failed to withdraw from employment in violation of DR 2-110(B)(4) of the Code.

CHARGE SIX

63. By failing to cooperate with and by attempting to interfere with his former clients' new representation as alleged in paragraphs 11, 12, 13, 19, 20, 21, 22, 29, 30, 31, 32, 43, 44, 45, 46, 47, 49, 50, 53, 54 and 56, respondent failed to withdraw properly from employment in violation of DR 2-110(A)(2) of the Code.

CHARGE SEVEN

64. By threatening a client and a client's new counsel with adverse action if he or she complained to the Committee, as alleged in paragraphs 24, and 33, respondent engaged in conduct that is prejudicial to the administration of justice in violation of DR 1-102(A)(5) of the Code.

CHARGE EIGHT

65. By falsely and recklessly affirming matters to the Civil Court and Surrogate's Court, as alleged in paragraphs 36 and 54, respondent stated or alluded to matters that he had no reasonable basis to believe were relevant to the case or supported by admissible evidence in violation of DR 7-106(C)(1) of the Code.

CHARGE NINE

66. By failing promptly to return clients' property despite due demand, as alleged in paragraphs 7, 11, 40, 42 and 43, respondent failed promptly to deliver property in his possession which his clients were entitled to receive, in violation of DR 9-102(B)(4) of the Code.

CHARGE TEN

67. By advocating a position in a matter which was materially adverse to the interests of a former client in the same matter, as alleged in paragraphs 48 through 57, respondent violated DR 5-108(a)(1) of the Code after the 1990 Amendments.

CHARGE ELEVEN

68. By threatening his clients and their new attorneys with adverse action and by physically and verbally abusing his clients as alleged in paragraphs 10, 12, 13, 18, 20, 21, 30, 42, 45 and 53, and by engaging in the conduct alleged in paragraphs 5 through 57, respondent engaged in conduct that reflects adversely on his fitness to practice law in violation of DR 1-102(A)(6) and DR 1-102(A)(7) of the Code after the 1990 Amendments.

69. Respondent knew or should have known in committing the acts set forth above that he was guilty of professional misconduct within the meaning of §603.2 of the rules governing the conduct of attorneys of the Appellate Division, First Judicial Department.

WHEREFORE, a hearing shall be held upon the within charges before the designated panel and upon the conclusion hereof, the hearing panel shall take such action as it deems appropriate pursuant to 22 N.Y.C.R.R. §605.14.

Dated: New York, New York
February 28, 1992

/s/ Hal R. Lieberman
HAL R. LIEBERMAN
Departmental Disciplinary
Committee
First Judicial Department
41 Madison Avenue
New York, New York 10010
(212) 685-1000

MADY J. EDELSTEIN
of Counsel

APPENDIX F

22 NYCRR § 605.22(c)

§ 605.22 Hearing Panels

(c) Quorum and Manner of Acting. All matters presented to a hearing panel shall be determined by three members of the panel. Two panel members assigned to a matter shall constitute a quorum for the transaction of business. All action shall require the concurrence of at least two members. At least two members of a hearing panel assigned to a matter shall have heard the entire proceeding. The third assigned member either shall have heard the entire proceeding before the hearing panel or shall have read the transcript of that portion (which may be all) of the proceeding not heard. In the event that one of the three members assigned to a matter dies, becomes incapacitated, or is otherwise unable to determine a matter, the fourth member shall take his or her place. If the fourth member dies, becomes incapacitated, or is otherwise unable to serve, the chairperson may designate another member of the Committee to serve in his or her place.

APPENDIX G

22 NYCRR § 603.4(a)(1)

§ 603.4 Appointment of Disciplinary Agencies: Commencement of Investigation of Attorney Misconduct; Complaints; Procedure in Certain Cases

(a)(1) This Court shall appoint a Departmental Disciplinary Committee for the Judicial Department, which shall be charged with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys to whom this Part shall apply, and to impose discipline to the extent permitted by section 603.9 of this Part. This court shall, in consultation with the Departmental Disciplinary Committee, appoint a chief counsel to such committee and such assistant counsel, special counsel and supporting staff as it deems necessary.

APPENDIX H

22 NYCRR § 603.4(a)(2)

§ 603.4 Appointment of Disciplinary Agencies: Commencement of Investigation of Attorney Misconduct; Complaints; Procedure in Certain Cases

(a)(2) The membership of the Departmental Disciplinary Committee shall be a total of not more than 44 persons each of whom shall be appointed by this Court for a term of three years, except members who have been appointed to complete unexpired terms, in which case such members may be reappointed for three-year or shorter terms. At least two-thirds of the members of the Departmental Disciplinary Committee shall be members of the bar of the state of New York in good standing, each of whom shall reside or have an office in the city of New York, and up to one-third of such members shall be persons who are not members of the bar, each of whom shall reside or have a principal place of business in the City of New York. Appointments to the Departmental Disciplinary Committee may be made from lists of nominees submitted by the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association, and by such other means which the Court deems in the public interest. A member of the bar who has served two consecutive terms shall not be eligible for reappointment until one year after the expiration of the second term. The appropriate committees of the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association may be designated to investigate and prosecute matters involving

alleged misconduct of attorneys. Upon such designation, references in sections 603.3, 603.4(a)(3), (b), (c) and (d), 603.5, 603.6, 603.9, 603.11, 603.12(a) and (e), 603.15 and 603.16 of the rules of this Court to the Departmental Disciplinary Committee with respect to the matter or matters to which such designation applies shall mean the Committee of the Association of the Bar of the City of New York, the New York County Lawyers' Association or the Bronx County Bar Association so designated.

DEC 29 1993

No. 93-726

In The

Supreme Court of the United States

October Term, 1993

OMAR ZAKI GHOBASHY,

Petitioner,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent.

Petition For Writ Of Certiorari To The New York State Court Of Appeals

REPLY BRIEF TO BRIEF IN OPPOSITION

OMAR ZAKI GHOBASHY
Counsel of Record
Petitioner, Pro Se
85 Wildwood Road
New Rochelle, New York 10804
(914) 834-8462

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QUESTION PRESENTED

It is [redacted] an error for the New York State Court of Appeals to decide that the order of the Appellate Division, First Department disbarring the applicant and removing his name from list of attorneys admitted to practice law in the State of New York, is not a final order from which an Appeal may be heard by the Court of Appeals?

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INTRODUCTION

Respondent in page (i) of his Brief states that it is not an error for the Court of Appeals to refuse to hear leave to appeal on the ground that the order appealed from is not a final order within the meaning of the Constitution. This contradicts the statement on page 4 that the Court of Appeals had decided the case on its merits. The decision was by Chief Judge only.

The charges served on Petitioner are not the charges made by the Panel, which formed up new charges at conclusion of the hearings. One of the original charges which is the charge of abuse against a client, Mr. Hassan, was dismissed by the Panel. The Panel issued a charge not previously made.

REASONS FOR GRANTING THE WRIT

General Statement

The Panel had no jurisdiction on the matter of El-Deeb, since the Chief of Disciplinary Committee dismissed the complaint as it was a fee dispute and referred it to the Bronx County Bar Association for mediation. Ms. Edelstein dispatched two letters to client and his new lawyer, which were used as a counterclaim in the action and were dismissed by the Court. She failed to submit the two letters at the request of Petitioner, and concealed them from the Panel. Despite the request of my attorney at Civil Court, Ms. Edelstein failed to submit to him papers of this case in her possession, which resulted in the dismissal of the Arbitration. This action is reinstated in Court after a new filing fee was paid and an order was made to that effect by the Court. It is a violation of

law for Ms. Edelstein to intervene in a Court case. It is not a disciplinary matter for the lawyer to sue client for his fee.

It is not a disciplinary matter for the lawyer to utilize the services of the person who introduced the client, to settle the fee without Court action. The allegation that this attorney continued to pursue the action after his discharge is untrue. This case was handled by another lawyer in the office. In Immigration cases, the new lawyer files a notice of appearance to be recognized as the attorney of record. Retiring attorney does not withdraw the papers he filed as this results in deportation of the client.

In this case, the Disciplinary panel made an attack on Petitioner on its opinion of the Court proceeding, when the case was dismissed and it had no jurisdiction to intervene in a Civil Court action. It submitted a wrong paper from the clerk of the Court that trial by the Court was not filed, when this statement is untrue as a Judge of the Civil Court had ordered a new trial. Ms. Edelstein intervened in a case dismissed by Chief of Disciplinary Panel, when she had no jurisdiction in the case. This charge should have been dismissed.

Disciplinary lawyers intervened in a Civil Court action without authority of the Court, and withheld papers necessary for the prosecution of the action. This former client testified that he obtained his residence with his original documents in his possession. Fraud was committed by new counsel against U.S. Immigration as follows:

Client had a prior non-immigrant worker's visa as a physiotherapist in New Jersey. Upon expiration of his temporary one year authorization, he came to me to apply for a renewal in New York. But his New Jersey visa had expired,

and therefore, he could not adjust his status in the United States. This adjustment in New York was previously denied, then through new counsel it was allowed. Dispute with client was that he concealed from New York the prior application of New Jersey. When requested to submit his extension of temporary status in New Jersey, as it is the practice, he failed to do so, and submitted it in New York instead. Immigration in New York advised the lawyer that they specifically asked him to submit his papers in Newark, but he failed to do so. At that time, he was resident of New Jersey. This client did not pay his fee. Disciplinary lawyer intervened in a case that was dismissed by the chief lawyer. Ms. Edelstein caused the loss of the arbitration for fee by withholding the papers. She concealed her letters from the Panel. This is an example of the cases in which the Panel found that this lawyer is a danger to the society.

Sufficient evidence was submitted on Applicant's medical and health condition at depositions and at trial, including a testimony by a doctor who testified on my behalf. The Court also observed my health condition and what they described as instability was actually strain because of the deterioration of my health. Petitioner was, in fact, taking medication during trial. It is, therefore, not true that the Panel and prosecutor were unaware of my health condition. The Appellate Division had before it medical reports and hospital reports. It was the Panel that insisted on holding the hearings at the time set. Petitioner, further, suffered a heart attack on June 12, 1992, as a result of hearing the recommendation to disbar him, which was followed by a congestive heart failure on December 1, 1992. Petitioner suffered a stroke, which caused extensive damage to Petitioner's eyesight, see Appendix A-3. Petitioner's lawyer was not allowed

an extension of time, resulting in the submission of non-notarized medical reports.

The number of the charges and of the hearings do not indicate that Petitioner had a fair trial. The Record is not against Petitioner, but contains both sides, and mostly, testimony on behalf of Petitioner. A four-session hearing is not what determines its length and fairness. The entire record should be examined. It may determine if the hearings contained credible or illegal evidence against Petitioner.

Respondent avoided the issue of the appearance of the parties, which were concealed by the Disciplinary lawyer. Their non-appearance was not disclosed until the date of the hearing. Other witnesses refused to appear, and have now disappeared; U.S. Immigration was investigating their case. Mrs. Al-Omari refused to appear and testify against this lawyer. The new lawyer, who had no knowledge of the matter, appeared. Petitioner is informed by the Insurance Company that she returned to Yemen. Immigration Service is seeking for her testimony on illegal papers filed by her deceased husband. Immigration Service is also investigating the travel agent in Brooklyn, who is producing false Yemeni documents, including the documents of the false Al-Omari family. These are the witnesses that Respondent alleges had appeared. The real witnesses did not appear, and their whereabouts had been concealed. An attempt to serve a subpoena on one of the witnesses failed because they do not reside at the addresses given and avoided service. Only one party, the wife of a former client, appeared after service on her at her work place.

The Panel asserts that mere grant of Permanent Residence disproves Petitioner's allegation of marriage fraud. The Immigration officer who appeared testified that no investigation is conducted until two years elapse from granting residence.

It is incorrectly asserted that Petitioner was being represented by an attorney in pre-trial proceeding. This is not true. Disciplinary Committee was advised that this lawyer is appearing in person.

The argument is not that the Appellate Division does not have the power to discipline an attorney, but this power is subject to appeal to the Court of Appeals and to the United States Supreme Court. The reference to the decision does not finally determine the action, and cannot be construed as the decision of the Court denying leave to appeal to the Court of Appeals. That denial renders the original order final in all respects. As a result, Petitioner was denied the right to engage in the practice of law, and his name was stricken from the list of lawyers in New York State. The order was final in all respects. Nothing else remains to be done.

Respondent argues that Petitioner was served notice of charges prior to hearing, but they were contrary to those charges that were made by the Panel at the hearing. New charges were made without notice.

With regard to the issue of the document that was taken by a complainant and turned over to the Disciplinary Committee, the Consulate of Egypt had filed charges with Disciplinary Committee and stated that it had exclusive jurisdiction over this matter, and that it was conducting an investigation of the issues. Mr. Hassan, the complainant, was

offered a settlement of his case by which he withdraws his complaint, and Ghobashy withdraws his complaint with the Government of Egypt. Mr. Hassan told the Consul General that after agreeing, he was served with a subpoena by Ms. Edelstein urging him (Mr. Hassan) not to cooperate with his own government. Chief of Disciplinary incorrectly claimed that he cannot cooperate with the investigation ongoing at the Egyptian Consulate because of confidentiality, when confidentiality was waived in writing by Petitioner. This matter should be reviewed by the Department of State. Taking papers from a file of a consulate in the United States is United States crime under United States laws.

In the case of Mr. Hassan, his new counsel requested a passport on the grounds that he will obtain his residence in Egypt, when he had applied through Peru, and eventually obtained his residence, without an attorney, in New York. The complainant did not enter Egypt with the Egyptian passport he obtained, but with a re-entry permit obtained from the U.S. Immigration, not disclosing that he was in possession of an Egyptian passport.

It is not a proper argument to state that there were several transcripts of hearings in which witnesses testified, when the Record is not before any appeal court to determine how much was in favor of Petitioner, how much illegal evidence, and how much excluded evidence without any legal basis.

The Brief of Respondent is not supported by any evidence and is taking advantage of the absence of Record before the Court. To prove his argument, he should have submitted the transcripts and points to the pages of his

argument. The cases cited are State Court cases, not controlling on this Court. We cited cases of this Court.

The Petition in Opposition also refers to the volume of the persons testifying on behalf of the Disciplinary Committee. Most witnesses were excludable and real witnesses who must have testified were prevented from appearing by the Disciplinary Committee. Those include complainants who were concealed to prevent discovery of their fraud and false filing of papers. Mr. Kahwaji and his wife did not appear and their addresses were known only to Disciplinary lawyer, who met with them and obtained their divorce papers. Instead, they brought an Immigration Officer, who is prohibited by law from appearing in a State proceeding. He appeared without the file to conceal his appearance from his supervisors and lawyers. The new lawyer who committed fraud and filed false papers was allowed to testify with the wife. The principal alien, the husband, Mr. Gallardo, was concealed.

In his Response, the Chief of Panel argues that the New York Law provides for selection of members of the Panel, who are both; judges and jury, not to be residents of the Court's county, but to have their principal place of business in New York, a provision that is illegal under U.S. Constitution. That provision tends to exclude the majority of New York City residents, who are minorities as witnessed by the membership in the Disciplinary Committee. Therefore, this lawyer of Egyptian origin was tried before a panel, which is not representative of the population of the City of New York, and who were prejudiced against this lawyer because of his national origin. The only member of the Panel who may have been impartial did not appear, and hearing was not

adjourned to ensure his appearance, or that member of the panel replaced by another member of the same background.

It is argued that members of the Panel could be selected from non-residents of the City or the Court. The law which so provides is unconstitutional as it permits members of the Panel who sit as Jury must be residents of the area under jurisdiction of the Court, and therefore the claim that a member could maintain an office for transaction of business in the County is unconstitutional. The residence of the other members of the Panel is not disclosed, nor the residence of the Panelist who did not appear and did not participate in the decision.

In fact this Panel condemned this attorney to death as he suffered a heart attack upon reading their decision to disbar him after long and distinguished service to the bar and to the United States.

All former clients were adjusted with their original documents in their possession. This attorney did not withhold any original document belonging to any former client.

Therefore, the volume of the evidence is illegal on behalf of Disciplinary. Illegal witnesses were presented. On the other hand, witnesses who testified on behalf of Petitioner were interrupted by the Panel and their testimonies were curtailed. Illegally appearing witnesses, the inability of Petitioner to subpoena witnesses, and the interruption of testimony of this attorney were the result of the prejudice of Chief Panelist.

What the Panel wrote was not a decision but was a Brief against this Petitioner, and all evidence submitted by him was concealed. The Record to which Respondent refers is not

all against Petitioner, but all evidence and testimony in support of Petitioner were omitted. Therefore, reference to the transcripts, which is not before any court, is misleading as it contains both sides of the case and evidence in support of the Petitioner.

The statement that this attorney is a danger to the society is contradicted by his record as an attorney for the American Indians in the United States and Canada for thirty years. He has good standing with U.S. legislators and New York legislators. This lawyer was allowed to pursue American Indian cases in Canada with the Candian government and was adopted as a Blood Brother by the American Indians in New York. He lectured the Green Berets at East Carolina College at Fort Braff, and served for many years in the United Nations.

It is to be noted that the issues are more than disciplinary, as they affect the national security of the U.S.A. The New York City officials were concerned on protecting illegal aliens and not cooperating with Immigration in their apprehension. The same position is taken by the New York City Courts.

Disclosure to the U.S. Immigration Service is no longer considered revealing of secrets of clients, as recently was ruled by U.S. Southern District Court in New York in a decision sent separately to the Court and served on the parties. Crime fraud exception states that communication between a lawyer and a client are not privileged if they are to further a future or an ongoing crime or fraud, cited in *Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032 (2d Cir 1984). In all mentioned cases, when this lawyer was informed of marriage fraud by clients, and began to investigate clients, they got angry and made complaints to Disciplinary. In cases of marriage fraud, clients were living apart or already

divorced and were trying to further their applications for Permanent Residence based on marriage. In the cases which were previously denied, Petitioner was retained to file appeals, and not to pursue a previously denied application.

Although I have lost my eye sight, I am writing this brief reply to defend my honor and obtain justice, which I obtained for my clients for thirty years.

Cases cited are not rebuttal to argument of Petitioner. Respondent did not refute to distinguish any case cited by Petitioner. There is not one single decision by New York County of disbarment of an attorney on similar charges. Disbarment remains to be excessive, cruel and stands out as discrimination. See A-1, Matter of Melvin M. Kazdin. Conviction of "serious crimes" is punishable by a one-year suspension. If anything, is this the practical application of double standards?

CONCLUSION

Not only that Certiorari should be granted, but based on the papers submitted, the Court is in a position to summarily reverse the Appellate Division and dismiss the charges [redacted] or order proper selection of the Panel in accordance to U.S. Constitution and Federal methods of selection.

Dated:
New York, N.Y.
December 29, 1993

Respectfully submitted,

Omar Z. Ghobashy
Petitioner, pro se
85 Wildwood Road
New Rochelle, N.Y. 10804
(914) 834-8462

Disciplinary Proceedings

Appellate Division, First Department

N.Y.L.J.
12/2/93

Matter of Melvin M. Kazdin, a suspended attorney.

Before Murphy, P.J., Sullivan, Ellerin, Kupferman and Ross, J.J.

Respondent was admitted to the Bar as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division of the Supreme Court, Second Judicial Department, on Dec. 18, 1957.

Richard M. Maltz, of counsel (Hal R. Lieberman, attorney) for petitioner; Michael S. Ross, of counsel (LaRossa, Mitchell & Ross, attorneys) for respondent.

Per Curiam – Respondent Melvin M. Kazdin was admitted to practice in New York by the Second Judicial Department on Dec. 18, 1957 and at all times relevant herein has maintained an office for the practice of law within the First Judicial Department. On Jan. 7, 1992 respondent pleaded guilty in the U.S. District Court for the Eastern District of New York to one count of tampering with a witness in violation of 18 U.S.C. §1512(b) and one count of tax evasion in violation of 26 U.S.C. §7201, both felonies under the United States Code. On May 4, 1992, respondent was sentenced to a fine of $150,000 plus a special assessment of $100, six months' electronic house arrest and five years' probation on each count, to run concurrently, as well as 400 hours of community service.

By order entered Oct. 29, 1992, this court determined that the crimes of which respondent was convicted are "serious crimes" under Judiciary Law §90(4)(d) and 22 NYCRR 603.12(b), referred the matter to the Disciplinary Committee to conduct a hearing and issue a report and recommendation to the court and suspended respondent from practice pending the determination of the disciplinary proceeding.

The Disciplinary Committee now moves to confirm the Hearing Panel's report and recommendation of a suspension of one year, retroactive to May 4, 1992, the date of respondent's federal court conviction, or until the termination of his federal probation, whichever is longer. Respondent cross-moves to confirm the report and recommendation of the Hearing Panel, including the recommendation that his reinstatement be automatic on conclusion of his suspension. We agree with the Hearing Panel's recommendation as to the appropriate sanction.

Accordingly, respondent's cross-motion is granted, respondent is suspended from the practice of law, for a period of one year, retroactive to May 4, 1992, or until the termination of respondent's federal probation, whichever is longer, with the direction that respondent be automatically reinstated on conclusion of his suspension.

All concur.

NEW YORK STATE

DEPARTMENT OF SOCIAL SERVICES (seal)

40 NORTH PEARL STREET, ALBANY, NEW YORK 12243

MICHAEL J. DOWLING
Commissioner

COMMISSION FOR THE BLIND AND
VISUALLY HANDICAPPED

SEPTEMBER 24, 1993

OMAR GHOBAS – OMAR Z. GHOBASHY
85 WILDWOOD ROAD
NEW ROCHELLE, NY 10804

BASED ON AN EYE REPORT SUMITTED TO US, YOU HAVE BEEN REGISTERED WITH THE COMMISSION FOR THE BLIND AND VISUALLY HANDICAPPED (CBVH) AS LEGALLY BLIND. YOUR REGISTER NUMBER IS: B7437Z.

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THE ENCLOSED PAMPHLET GIVES A BRIEF OUTLINE OF SOME OF THE AVAILABLE SERVICES. THERE ARE MANY OTHER ASPECTS OF OUR PROGRAM WHICH MIGHT ALSO PERTAIN TO YOU DEPENDING UPON YOUR INDIVIDUAL NEEDS AND CIRCUMSTANCES.

TO APPLY FOR SERVICES, PLEASE COMPLETE THE ENCLOSED APPLICATION AND RETURN IT IN THE POSTAGE PAID ENVELOPE. YOU WILL BE CONTACTED BY ONE OF OUR REHABILITATION COUNSELORS.

IF YOU NEED HELP IN APPLYING OR DESIRE MORE INFORMATION, PLEASE CONTACT THE CBVH AREA OFFICE SHOWN BELOW.

IF YOU DO NOT WISH TO APPLY AT THIS TIME, WE WOULD APPRECIATE YOUR NOTIFYING THE AREA OFFICE OF THIS FACT.

COMMISSION FOR THE BLIND AND VISUALLY HANDICAPPED
150 GRAND STREET – 2ND FLOOR
WHITE PLAINS, NY 10601
TELEPHONE: 914-993-5370

14A/05
ENCS.